Petition

81-283

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1981.

No. _____

* *

WALLACE E. BURKEE,

Petitioner,

vs.

ROBERT L. BUSCHE,

Respondent.

* *

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether Federal Courts, in damage actions brought under 42 U.S.C. sec. 1983, are obliged, either because of the operation of 42 U.S.C. sec. 1988 or for general reasons of federalism, to determine whether state law is consistent with federal policy and so should be applied as the measure of damages or whether Federal Courts are free to apply a federal common law rule without any consideration of state law.

Whether the 7th Circuit in the instant matter so failed to adhere to principles of proximate cause as to violate this Court's holding in Carey v. Piphus, 435 U.S. 247.

Whether plaintiffs who have admitted to and have been found guilty of wrongdoing in a prompt due process hearing would be unjustly enriched under the rule of Carey v. Piphus if allowed to receive compensatory damages.

Whether the due process clause of the Fifth Amendment of the United States Constitution required a Federal District Court to provide a party with an adversary hearing on the question of the amount of attorney's fees where a remand

by the Court of Appeals has raised additional questions of disputed fact.

PARTIES TO THE PROCEEDING

All parties to the proceeding are contained in the caption.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS ii

TABLE OF CASES vi

TABLE OF CONSTITUTIONAL & STATUTORY AUTHORITY xi

TABLE OF OTHER AUTHORITY xii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

I. FEDERAL COURTS, IN DAMAGE ACTIONS BROUGHT UNDER 42 U.S.C. SEC. 1983, ARE OBLIGED EITHER BECAUSE OF THE OPERATION OF 42 U.S.C. SEC. 1988 OR FOR GENERAL REASONS OF FEDERALISM, TO DETERMINE WHETHER STATE LAW IS CONSISTENT WITH FEDERAL POLICY AND SO SHOULD BE APPLIED AS THE MEASURE OF DAMAGES OR WHETHER FEDERAL COURTS ARE FREE TO APPLY A FEDERAL COMMON LAW

RULE WITHOUT ANY CONSIDERATION OF STATE LAW. 9

A.1. The Petition Should Be Granted Because The 7th Circuit Court of Appeals Lacked Both Constitutional And Statutory Authorization To Apply A Federal Common Law Standard As The Measure Of Damages Under 42 U.S.C. Sec. 1983. 9

A.2. The Petition Should Be Granted Because The Holding Of 7th Circuit Is Inconsistent With Decisions Of This Court On The Applicability Of Sec. 1988 To Sec. 1983. 17

A.3. The Petition Should Be Granted Because Wisconsin Tort Law Is Not Generally Inconsistent With The Policies Of Sec. 1983 And, Had Wisconsin Tort Law Been Applied, There Would Have Been A Great Likelihood That The Award Of Compensatory Damages Would Have Been Substantially Reduced Or Reversed. 21

A.4. The Petition Should Be Granted In Order To Resolve An Apparent Inconsistency Between Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) And Later Case Law Construing Sec. 1988's Applicability To Sec. 1983. 23

A.5. The Petition Should Be Granted In Order To Provide A Definition To The "Common Law of Torts" Used by This Court In Carey v. Piphus, 435 U.S. 247, As The Starting Point For The Determination Of Damages In Sec. 1983 Actions. 25

A.6. The Petition Should Be Granted Because The Decision Of The Court Of Appeals Is Contrary To The Policy Of This Court On Sec. 1983 Actions 27

B. Should It Be Determined That Sec. 1983 Establishes A Federal Rule Of Damages Without Reference To Sec. 1988, The 7th Circuit Erred In Not Granting Any Consideration To State Law, And This Petition Should Be Granted For That Reason. 29

II. THE 7TH CIRCUIT IN THE INSTANT MATTER SO FAILED TO ADHERE TO PRINCIPLES OF PROXIMATE CAUSE AS TO VIOLATE THIS COURT'S HOLDING IN CAREY V. PIPHUS, 435 U.S. 247. 33

III. PLAINTIFFS WHO HAVE ADMITTED TO AND HAVE BEEN FOUND GUILTY OF WRONG-DOING IN A PROMPT DUE PROCESS HEARING WOULD BE UNJUSTLY ENRICHED UNDER THE RULE OF CAREY V. PIPHUS IF ALLOWED TO TO RECEIVE COMPENSATORY DAMAGES. 39

IV. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION REQUIRES A FEDERAL DISTRICT COURT TO PROVIDE A PARTY WITH AN ADVERSARY HEARING ON THE QUESTION OF THE AMOUNT OF ATTORNEY'S FEES WHERE A REMAND BY THE COURT OF APPEALS HAS RAISED ADDITIONAL QUESTIONS OF DISPUTED FACT. .. 41

CONCLUSION 52

APPENDIX A [Constitutional and Statutory Provisions Involved] A-1

APPENDIX B [Opinion of the Court of Appeals, reported at 649 F.2d, 509, 7th Cir.] A-4

APPENDIX C [Opinion of the District Court, reported at 474 F.Supp. 484, (E.D. Wis.)] A-26

APPENDIX D [Opinion of the District Court on Petitioner's Motions for rehearing on damages and attorney's fees, reported at 483 F.Supp. 1326] A-63

APPENDIX E [Judgment of the Court of Appeals entered May 21, 1981]..... A-68

APPENDIX F [Petitioner's Motion pending before the District Court for adversary hearing in remand of attorney's fees] A-70

APPENDIX G [Testimony at Trial Court on sources of Respondent's marital difficulties] A-72

APPENDIX H [Testimony at Trial Court on nature of Respondent's "alcoholic" problems] A-78

TABLE OF CASES

American Textile Manufacturers Institute, Inc. v. Donovan, ___U.S.___, 49 USLW 4720 (1981) 13

Alsteen v. Gehl, 21 Wis. 2d, 349 124 N.W. 2d 312 (1963) 35

Baltimore & Ohio R. Co. v. United States, 298 U.S. 349 (1936) 46

Basista v. Weir, 340 F.2d 74 (3rd Cir., 1965) 12,14,15

Baskin v. Parker, 602 F.2d 1205 (5th Cir., 1979) 24

Beard v. Mitchell, 604 F.2d 485 (7th Cir., 1979) 35

Bell v. Gayle, 384 F.Supp. 1022 (N.D. Tex., 1974) 37

Board of Regents v. Tomanio, ___U.S.___, 64 L.Ed. 2d 440, 100 S.Ct. ___(1980) 19,20,21,25

Board of Trustees, Etc. v. Holso, 584 P.2d 1009, reh den, 587 P.2d 203 (Supreme Court of Wyo., 1978) 35,36

Bradley v. Cramer, 66 Wis. 297, 28 N.W. 372 (1886) 35

Burks v. Lasker, 441 U.S. 471 (1979) 30,32,33

Butner v. United States, 440 U.S. 48 (1979) 31

Carey v. Piphus, 435 U.S. 247 (1978) 25,26,30,33, 39,40

Carrigan v. Central Adjustment Bureau, 502 F.Supp. 468 (N.D. Ga., 1980) 25

Caton Ridge Nursing Home v. Califano, 447 F.Supp. 1222 (D.Md., 1978) 46

Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979) 28,29

City of Milwaukee v. Illinois, ___U.S___, 49 USLW 4445 (1981) 10,25

Codd v. Velger, 429 U.S. 624 (1977) 38

Committee for The Consideration of the Jones Falls Sewage System v. Train, 539 F.2d 1006 (4th Cir., 1976) (en banc) 25

Cooke v. United States, 267 U.S. 517 (1925) 46

DeSylva v. Ballantine, 351 U.S. 570 (1956) 31

Erie Ry Co. v. Tompkins, 304 U.S. 64 (1938) 9

Felix v. Young, 536 F.2d 1126 (6th Cir., 1976) 50

Fountain v. Filson, 336 U.S. 681 (1949) reh. den.337 U.S. 921 50

Garfield v. United States ex rel. Goldsby, 211 U.S. 249 (1908) 45

Goldberg v. Kelly, 397 U.S. 254 (1970) 48

Howe v. Smith, ___U.S.___, 49 USLW 4715 (1981) 11

Imprisoned Citizens Union v. Shapp, 473 F.Supp. 1017 (E.D. Pa., 1979) 50,51

Ingraham v. Wright, 430 U.S. 651 (1977) 31

Kent v. United States, 383 U.S. 541 (1966) 46

Konczak v. Tyrrell, 603 F.2d 13 (7th Cir., 1979) 45

Laska v. Steinpreis, 69 Wis. 2d 307, 231 N.W.2d 196 (1975) 23,35

Lathan v. Journal Co., 30 Wis. 2d 146, 140 N.W. 2d 417 (1966) 22

Laurent v. VanSomple, 161 Wis. 354, 154 N.W. 366 (1915) 35

Lindy Bros Builders of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir., 1973) 50

Lucia v. Duggan, 303 F.Supp. 112 (D. Mass., 1969) 35

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) ... 48

Martinez v. California, 444 U.S. 277 (1980) 35

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) 48

Meredith v. Hardy, 554 F.2d 764 (5th Cir., 1977) 50

Monroe v. Pape, 365 U.S. 167 (1961) 11,12,30

Moor v. County of Alameda, 411 U.S. 693 (1973) 24

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 47

Murphy v. Kolovitz, 635 F.2d 662 (7th Cir., 1981) 44,45

Muscare v. Quinn, 614 F.2d 577 (7th Cir., 1980) 41,42,43,44

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir., 1978) 44

Northwest Airlines v. Transport Workers of America, ___ U.S.___, 49 USLW 4303 (1981).. 10

Nufer v. Village Board of Village of Palmyra, 92 Wis.2d 289, 284 N.W.2d 649 (1979) 22

Parratt v. Taylor, ___U.S.___, 68 L.Ed. 2d 420, 101 S.Ct. ___ (1981) 31

Paul v. Davis, 424 U.S. 693 (1976) 27

Perkins v. Standard Oil Co. of Calif., 399 U.S. 222 (1970) 51

Prahl v. Brosamle, 98 Wis.2d 131, 295 N.W. 2d 768 (Court of Appeals, 1980) 22

Rizzo v. Goode, 423 U.S. 362 (1976) 28

Robertson v. Wegmann, 436 U.S. 584 (1978) 17,18,19,20, 21,25,26,33

Sargeant v. Sharp, 579 F.2d 645 (1st Cir., 1978) 49

Schaefer v. State Bar, 77 Wis. 2d 120, 252 N.W. 2d 343 (1977) 22

Screws v. United States, 325 U.S. 91 (1945) 28

Shaw v. Garrison, 545 F.2d 980 (5th Cir., 1977) 17

Simonson v. United Press Intern., Inc., 500 F.Supp. 1261 (E.D. Wis., 1980) 22

Sniadach v. Family Finance Corp of Bay View, 395 U.S. 337 (1969)..... 48

Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) 23,24,25

Taplick v. City of Madison Personnel Board, 97 Wis. 2d 162, 293 N.W. 2d 173 (1980) .. 22

Terry v. Kolski, 78 Wis. 2d 475, 254 N.W. 2d 704 (1977) .. 22

Texas Industries Inc. v. Radcliff Materials, Inc., ___U.S.___, 49 USLW 4537 (1981)..... 10,11,16

United Airlines v. McMann, 434 U.S. 192 (1977) 13

United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) 31

Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir., 1974) cert den. 425 U.S. 997 (1976) 42

Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) 46

TABLE OF CONSTITUTIONAL & STATUTORY AUTHORITY

UNITED STATES CONSTITUTION, V AMENDMENT 1,41,45

UNITED STATES CONSTITUTION, XIV AMENDMENT 47

Clayton Antitrust Act, 15 U.S.C. sec. 15 51

Investment Company and Investment Advisors Acts, 15 U.S.C. sec. 80 a-1 et seq.; sec. 80 b-1 et seq. 30

28 U.S.C. sec. 1254(1) 1

28 U.S.C. sec. 1291 1

28 U.S.C. sec. 1331 1

28 U.S.C. sec. 1343 1

Federal Tort Claims Act, 28 U.S.C. secs. 1346(b) and 2671-2680 31

42 U.S.C. sec. 1981 24

42 U.S.C. sec. 1982 24

42 U.S.C. sec. 1983 1,2,9,11,12,13,14,15,16,17,18,19,20,21,22,23,24,26,27,28,29,30,32,33,35,37,38

42 U.S.C. sec. 1985 2

42 U.S.C. sec. 1988 ..... 1,2,9,12,13,14,17,18,19,20,23,24,25,26,27,29,41.52

Federal Rule of Civil Procedure 56 49,51

51.01(1), Wis. Stats. 39

62.13, Wis. Stats. 4

TABLE OF OTHER AUTHORITY

PROSSER, LAW OF TORTS, 4th Ed. . 34,35

OPINIONS BELOW

The opinion of the Court of Appeals (App. B) is reported at 649 F.2d 509 (7th Cir., 1981). The opinion of the District Court on the question of damages (App. C) is reported at 474 F.Supp. 484 (E.D. Wis., 1979), sub nom. Busche v. Bosman. The opinion of the District Court denying Petitioner's motion for rehearing to obtain a breakdown of the elements of compensatory damages and in order to set attorney's fees under 42 U.S.C. sec. 1988 (App. D) is reported at 483 F.Supp. 1326 (E.D. Wis., 1980).

JURISDICTION

The judgment of the Court of Appeals (App. E) was entered on May 21, 1981. Jurisdiction at the trial level was premises on 28 U.S.C. sec. 1331 and 28 U.S.C. sec. 1343. The appeal to the Court of Appeals was taken pursuant to 28 U.S.C. sec. 1291. The jurisdiction of this Court is involved under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved is the Due Process Clause of the Fifth Amendment. The statutes involved are 42 U.S.C. secs. 1983 & 1988. These are reproduced in Appendix A.

STATEMENT OF THE CASE

This is a suit brought under 42 U.S.C. sec. 1983. At the trial level, Respondent Robert Busche was awarded $10,000 in compensatory damages, $2,000 in punitive damages and attorney's fees, pursuant to 42 U.S.C. sec. 1988, of $9,175 assessed aginst Petitioner Wallace Burkee. Court costs were also assessed. The Court of Appeals affirmed the awards of compensatory and punitive damages and court costs, and remanded the award of attorney's fees to the trial level for reconsideration in the light of standards different from those employed by the trial court. This suit was originally brought pursuant to 42 U.S.C. sec. 1983 and 42 U.S.C. sec. 1985 and involved seven defendants in addition to Petitioner. The trial court dismissed the action against every defendant but Petitioner. None of the other defendants are parties before this Court.

Robert Leslie Busche joined the City of Kenosha Police Department in 1969 as a patrolman. One of his duties was to complete State of Wisconsin motor vehicle forms entitled

"Application for Registration and Certificate of Title" ("Section 2101 Forms"). These forms were used both to register new cars or to note changes in registration of other cars. These forms contain the following instructions in a box designated "Law Enforcement Officer's Certificate of Inspection":

> "Identification of Engine and Serial numbers must be taken directly from vehicle. This is to certify that I have personally checked the vehicle described on the reverse side of this application and found the numbers to be _____."

Sometime in May, 1974, the Federal Bureau of Investigation informed the Chief of Police of Kenosha, Robert Bosman, that Busche and another police officer were cooperating in a federal grand jury investigation of an interstate automobile theft conspiracy. The investigation focused on, inter alia, the activities of Busche and Leslie Eugene White, the owner of White Auto Sales, a car dealership located several miles outside of the City of Kenosha. Busche was alleged to have signed 2101 forms in blank, without physically inspecting the cars, and to have provided these

to White. Busche later admitted to the truth of these allegations.

The grand jury returned an eleven count indictment against White and others on August 5, 1974. Busche was named as an unindicted co-conspirator in the theft ring because of his role in signing 2101 forms for White.

Mayor Wallace Burkee was never informed of the investigation. He learned of the indictments from an article in the August 6, 1974, Milwaukee Sentinel. Also on August 6, Police Chief Bosman decided to suspend Busche with pay until the investigation was complete.

Sometime between August 6 and August 9, Burkee verbally instructed Bosman to terminate Busche's employment. He repeated this order on August 9. Busche was given the option of resigning by August 12, or be terminated. When he did not resign, Bosman sent Busche a written notice of termination. This was done in violation of sec. 62.13, Wisconsin Statutes, which required a pre-termination hearing be held before the Police and Fire Commission.

Busche made a written demand for a hear-

ing before the Commission. The Commission granted his request and held a hearing on September 11, 1974. At the hearing, the Commission reinstated Busche with backpay after determining that the August 12 termination was improper. Busche admitted at the hearing that he had signed 2101 forms in blank and furnished them to White. The Commission decided, on September 22, to suspend Busch. as a penalty, without pay or benefits for sixty days. Although Busche was aware that he had the right to appeal this decision to Kenosha County Circuit Court, he did not do so.

Busche commenced this action on August 9, 1976 against eight defendants. Burkee was found liable for compensatory and punitive damages, attorney's fees and court costs. The action was dismissed as to the other defendants. Damages were based on damage to reputation because of adverse newspaper coverage and emotional distress.

On appeal, Burkee argued, inter alia, that the District Court erred in its application of a federal common law rule of damages.

Burkee argued that had the trial court applied analogous Wisconsin doctrines of tort law, the award of compensatory damages would have been substantially reduced or reversed. The Court of Appeals affirmed the use of federal common law, stating:

> "And since the protection afforded by sec. 1983 'was not intended by Congress to differ from state', Basista v. Weir, 340 F.2d 74, 86 (3rd Cir., 1965), federal, not state, common law governs the determination of damages in sec. 1983 actions." slip op., at 13.

The Court then proceeded to apply federal common law standards to assess damages based on damage to reputation and emotional distress. The Petitioner submits that if the Court had applied analogous Wisconsin doctrines of proximate cause, defamation and intentional infliction of emotional distress, the award of compensatory damages would have been substantially reduced or reversed.

The Petitioner also asserted that, whether or not a federal common law applies, the trial court's award of compensatory damages was based on an insufficient showing of causation. Pe-

titioner contested findings of fact 72, 73 and 74, 474 F.Supp. at 493. The trial court apparently relied on these findings of fact to award compensatory damages. The trial court did not make any conclusions of law on this issue.

Part of the trial court's award apparently was founded on marital problems of Busche's. Petitioner asserted that factors other than Busche's deprivation of due process were proximately responsible for his marital problems (Finding of Fact 72). Testimony at trial clearly established this and this testimony is contained in Appendix G.

Finding of Fact 73 indicates that the Court, in awarding damages, also considered events that occurred after Busche was given his due process hearing. The Petitioner contended that the trial court failed to adhere to traditional theories of proximate cause when it considered these events as factors in the award of damages.

Likewise, it appears (Findings of Fact 72 and 73) that the trial court considered Busche's "alcoholic problems" in its award of damages. This, too, was based on an insufficient showing

of causation. (See App. H)

Finally (Finding of Fact 74), it appears that the trial court based part of its award on the publicity surrounding Busche's suspension and termination. The Petitioner asserted that any award based on publicity should be reversed for lack of causation. The trial court intimated (Findings of Fact 40, 41, 44, 45, 62, 74) that part of the award was based on coverage by the local newspaper and radio stations. Petitioner asserted additionally that, given the truth of this coverage, damages should not have been awarded.

Petitioner finally notes that the Court of Appeals remanded the District Court's award of attorney's fees for reconsideration by the trial court. Petitioner asserts that should this petition be granted, the issue of attorney's fees should be considered by this Court in the light of principles of equity and fairness.

Additionally, Petitioner notes that the Court of Appeals indicated that an adversary hearing on the question of attorney's fees might not be required (slip op., at 21, n. 15).

Petitioner has moved the District Court, on remand, for an adversary hearing on this issue (App. F). Petitioner submits that, in the interest of judicial economy, depending on the outcome at the trial level and this Court's dispostion of the instand petition, that this point be preserved for further consideration in the proceeding before it.

REASONS FOR GRANTING THE WRIT

I. FEDERAL COURTS, IN DAMAGE ACTIONS BROUGHT UNDER 42 U.S.C. SEC. 1983, ARE OBLIGED EITHER BECAUSE OF THE OPERATION OF 42 U.S.C. SEC. 1988 OR FOR GENERAL REASONS OF FEDERALISM, TO DETERMINE WHETHER STATE LAW IS CONSISTENT WITH FEDERAL POLICY AND SO SHOULD BE APPLIED AS THE MEASURE OF DAMAGES OR WHETHER FEDERAL COURTS ARE FREE TO APPLY A FEDERAL COMMON LAW RULE WITHOUT ANY CONSIDERATION OF STATE LAW.

A.1. The Petition Should Be Granted Because The 7th Circuit Court of Appeals Lacked Both Constitutional And Statutory Authorization To Apply A Federal Common Law Standard As The Measure Of Damages Under 42 U.S.C. Sec. 1983.

It is a well established principle of constitutional law that Federal Courts possess only limited jurisdiction. They may not develop a "general federal common law". Erie Ry Co. v. Tompkins, 304 U.S. 64, 78 (1938). They "do not possess a general power to develop and apply

their own rules of decision". City of Milwaukee v. Illinois, ___ U.S. ___, 49 USLW 4445, at 4447 (1981). See also Northwest Airlines v. Transport Workers of America, ___U.S.___, 49 USLW 4303 (1981). Rather, Federal Courts are free to fashion federal common law remedies in only a few narrowly defined areas.

This Court, in the term just completed, outlined the contours of these areas. In Texas Industries, Inc. v. Radcliff Materials, Inc., ___U.S.___, 49 USLW 4537 (1981), this Court dealt with the question whether the federal antitrust laws allowed a defendant against whom damages had been assessed, the right of contribution from other conspirators in the forbidden activity. The statutes were silent on this issue. The Court stated:

> "There is, of course, 'no general federal common law'. Erie Ry Co. v. Tompkins, 304 U.S. 64, 78 (1938). Nevertheless, the court has recognized the need and authority in some limited areas to formulate what has come to be known as 'federal common law'. See United States v. Standard Oil, 332 U.S. 301, 308 (1947). These instances are 'few and restricted', Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963) and fall into essentially two categories: Those in which a federal rule of damages is 'necessary to pro-

> tect uniquely federal interests', Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964), and those in which Congress has given the courts the power to develop substantive law, Wheeldin v. Wheller, supra, at 652." Id., at 4540.

The 7th Circuit premises its holding on the latter category; it found itself statutorily authorized to resort to the federal common law as the measure of damages. It stated:

> "And, since the protection afforded by sec. 1983 'was not intended by Congress to differ from state to state', Basista v. Weir, 340 F.2d 74, 86 (3rd Cir., 1965), federal, not state, common law governs the determination of damages in sec. 1983 actions." Busche v. Burkee, slip op., at 13 (1981).

Petitioner asserts that the 7th Circuit lacked the statutory authorization to hold as it did. A basic rule of interpretation in this Court is that statutory construction must begin with the language of the statute itself. Howe v. Smith, ___U.S.___, 49 USLW 4715, 4717 (1981). 42 U.S.C. sec. 1983 authorizes anyone deprived of the rights, privileges or immunities of the Constitution or law by anyone acting under color of state law to bring an action in law or equity to redress the deprivation. It has long been held, see, e.g. Monroe v. Pape,

365 U.S. 167 (1961), that litigants could bring actions for damages under sec. 1983. The statute clearly allows for such suits. The statute is silent, however, on the question whether state tort law or the "federal common law" should be applied as the appropriate measure of damages. This silence was noted as long ago as Basista v. Weir, 340 F.2d 74, 85 (3rd Cir., 1965).

Petitioner submits that the 7th Circuit erred in applying a federal common law rule of damages in the manner it did. 42 U.S.C. sec. 1983 is part of a series of statutes governing civil rights suits in federal courts. This series must be read as a unit. Section 1983 is silent on the choice of law in damages actions. 42 U.S.C. sec. 1988 should therefore apply. Section 1988 provides that where the civil rights statutes are deficient in some respect"

> "[T]he common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the

trial and disposition of the cause ...". 42 U.S.C. sec. 1988.

It is a rule of statutory interpretation in this Court that where the plain language of a statute is unambiguous, there is no need to carry analysis further. American Textile Manufacturers Institute, Inc. v. Donovan, ___U.S. ___, 49 USLW 4720, 4725 (1981); United Airlines v. McMann, 434 U.S. 192, 199 (1977). Petitioner asserts that the language of sec. 1988 is clear. The application of sec. 1988 to sec. 1983 can best be expressed syllogistically. Sec. 1983 authorizes actions for damages; it is silent on the choice of laws question. Sec. 1988 authorizes the Federal Courts, where the civil rights statutes are deficient on a question to look to "the common law, as modified by state law, where the common law is not inconsistent with the Constitution or laws of the United States". Therefore, on a question of damages, unless Wisconsin tort law is inconsistent with the United States Constitution or the laws of the United States, it must be resorted to by the Federal Court. The Federal Courts, under

the plain language of the statute, lack statutory authority, absent a finding of inconsistency, to fashion a federal common law remedy.

The application of sec. 1988 to determine the choice of law in sec. 1983 damage actions was recognized in Basista v. Weir, 340 F.2d at 85-86.

> "Section 1983, Title 42 USCA, is completely silent as to the kind of damages which may be awarded an injured plaintiff in a civil rights suit such as that at bar. The statute does not use the word "damages" but merely states that the offending person 'shall be liable to the party injured in an action at law'. Obviously, this connotes damages of some kind, but goes no further."

The Court then cited 42 U.S.C. sec. 1988 and continued:

> "Section 1988 has not been construed by any court insofar as we have been able to ascertain in respect to the identical issue that we have before us. The mandate the statute imposes seems clear, however, without judicial interpretation. It provides that the laws of the United States shall be employed in vindicating civil rights in civil suits insofar as they are suitable to the subject but where those laws 'are not adapted to the object or are deficient,' then the law of the state wherein the court of the United States sits shall be applied to sup-

> ply the deficiency, so far as the constitution and statutes of the state are not inconsistent with the Constitution and laws of the United States." Id., at 85-86.

Basista went from this reasoning to find a general federal common law applicable to sec. 1983 actions. Petitioner submits that Basista's conclusion is not supported by its reasoning. Basista found sec. 1983 deficient on the question of choice of laws. It then correctly noted that it was obliged to test the state law for its consistency. It failed to do this. Instead, the Basista Court reached out and determined that a federal common law rule should apply to sec. 1983 damages questions. This conclusion is unsupported by the statutory language and the court's own reasoning.

The 7th Circuit in the instant case relied on Basista to apply a federal common law rule. Petitioner asserts that, based on the plain language of the statute and the Basista Court reasoning, this was error. For this reason, and in order to properly limit Basista to its rather unusual set of facts, this petition should be granted. Thus, the 7th Circuit lacked

the statutory authority to hold as it did.

It is noted that the "federal common law" upon which the 7th Circuit based its holding likewise does not fall within the first category of cases set out in Texas Industries; a federal rule in sec. 1983 actions is not "necessary to protect uniquely federal interests". Id.

This Court cited a number of cases which it found to have fallen within this category (See footnotes 12-14, 49 USLW at 4540), and synthesized them. The Court concluded:

> "In these instances, our federal system does not permit the controvery to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control." Id., at 4540.

Actions for damages brought under 42 U.S.C sec. 1983 do not meet either prong of this test. They do not intimately involve the interests of the United States as sovereign; nor do they possess an interstate or international nature sufficient to justify a federal common law

remedy. Thus, the only justification for the use of a federal common law remedy is statutory authorization. Such authorization is lacking.

A.2. The Petition Should Be Granted Because The Holding Of 7th Circuit Is Inconsistent With Decisions Of This Court On The Applicability Of Sec. 1988 To Sec. 1983.

This Court has recently found sec. 1988 controlling on several choice of laws questions on issues where sec. 1983 is silent.

Robertson v. Wegmann, 436 U.S. 584 (1978), involved a sec. 1983 action brought by Clay Shaw against Jim Garrison, the district attorney for Orleans Parish, Louisiana, and others. Shaw died while the trial was pending. Under Louisiana law, the action would have abated as Shaw was not survived by anyone statutorily authorized to continue the suit. The Court of Appeals, Shaw v. Garrison, 545 F.2d 980 (5th Cir., 1977), found the Louisiana abatement statute inconsistent with federal policy and stated:

> "[A]s a matter of federal common law, a sec. 1983 action instituted by a plaintiff prior to his death survives in favor of his estate." Id., at 987.

This Court reversed the Court of Appeals.

It first determined that sec. 1983 was silent on the question of abatement and then applied sec. 1988.

> "When a federal law is thus 'deficient', sec. 1988 instructs us to turn to 'the common law as modified and changed by the constitution and statutes of the [forum] State', as long as these are 'not inconsistent with the Constitution and laws of the United States...'. Regardless of the source of the law applied in a particular case, however, it is clear that the ultimate rule adopted under sec. 1988 is a 'federal rule responsive to the need whenever a federal right is impaired'." (cites omitted) Robertson v. Wegmann, supra, at 588-589.

This Court went on to hold that the action properly abated under Louisiana law. It added these comments on what constitutes "inconsistency" with the laws and Constitution of the United States:

> "A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the sec. 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be esentially irrelevant. But sec. 1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or

> rejected based solely on which side is advantaged thereby. Under the circumstances presented here, the fact that Shaw was not survived by one of several close relatives should not itself be sufficient to cause the Louisiana survivorship provisions to be deemed 'inconsistent with the Constitution and laws of the United States'." 42 U.S.C. sec. 1988. Id., at 593 (footnote omitted).

The Robertson Court also indicated what was required to find the state law inconsistent with the laws and Constitution of the United States.

> "Despite the broad sweep of sec. 1983, we can find nothing in the statute or its underlying policies to indicate that a state law causing abatement of a particular action should invariably be ignored in favor of a rule of absolute survivorship. The policies underlying sec. 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law ... .
>
> No claim is made here that Louisiana's survivorship laws are in general inconsistent with these policies, and indeed most Louisiana actions survive the plaintiff's death." (cites omitted) Id., at 590-591.

Board of Regents v. Tomanio, ___U.S.___, 64 L.Ed. 2d 440, 100 S.Ct. ___ (1980), follows the Robertson theme. The plaintiff was a chiropractor denied a license to practice in New York. She first sought relief in state court.

When this proved fruitless, she pursued a sec. 1983 remedy in Federal Court. By this time, the New York statute of limitations barred her claim. The lower courts carved out a federal tolling rule applicable to the plaintiff's position. This Court reversed. This Court first found sec. 1983 silent on the question of statutes of limitations; it then went to sec. 1988 and determined that it would apply the state rules on statutes of limitations and tolling, unless inconsistent with the policies underlying sec. 1983. The Court relied on Robertson to find that state policy is not inconsistent with sec. 1983 merely because it causes a plaintiff to lose a cause of action. The Tomanio Court found:

> "The [Robertson] Court went on to identify two of the principle policies embodied in sec. 1983 as deterrence and compensation." 64 L.Ed. 2d at 450.

Thus, wherever sec. 1983 is deficient, Federal Courts should look to sec. 1988 and apply state law where state law is not inconsistent with the policies of sec. 1983. Two policies with which state law must not be inconsistent are

compensation and deterrence. This Court, in both Robertson and Tomanio carefully noted that a state law is not inconsistent merely because a particular plaintiff is disadvantaged; the state law must be generally inconsistent. Because the 7th Circuit failed to determine whether Wisconsin tort law was generally inconsistent with these policies before applying a federal common law standard, it should be reversed by this Court.

A.3. The Petition Should be Granted Because Wisconsin Tort Law Is Not Generally Inconsistent With The Policies Of Sec. 1983 And, Had Wisconsin Tort Law Been Applied, There Would Have Been A Great Likelihood That The Award Of Compensatory Damages Would Have Been Substantially Reduced Or Reversed.

The compensatory damages awarded by the trial court and affirmed by the Court of Appeals fall into two general categories; damage to reputation and emotional distress. Wisconsin case law governing each of these areas cannot be said to be inconsistent with the laws and Constitution of the United States.

Wisconsin has recognized jurisdiction within the state courts to hear sec. 1983

actions. Terry v. Kolski, 78 Wis. 2d 475, 254 N.W. 2d 704 (1977). Wisconsin has also recognized suits for damage to reputation because of denial of due process. Nufer v. Village Board of Village of Palmyra, 92 Wis. 2d 289, 284 N.W. 2d 649 (1979); Taplick v. City of Madison Personnel Board, 97 Wis. 2d 162, 293 N.W. 2d 173 (1980). Petitioner maintains that, under the language of these opinions and by analogy to the state law of defamation, recovery would have been denied where, as in the instant case, the underlying truth of the allegedly damaging newspaper coverage is not in dispute.[1]

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[1] Defamation under Wisconsin law has been defined as embracing damages to reputation. Lathan v. Journal Co., 30 Wis. 2d 146, 151, 140 N.W. 2d 417 (1966); Schaefer v. State Bar, 77 Wis. 2d 120, 122, 252 N.W. 2d 343 (1977). Truth may also serve as a defense. The challenged article need not be totally accurate but need only be substantially true to be protected. Prahl v. Brosamle, 98 Wis. 2d 130, 141, 295 N.W. 2d 768 (Ct. of Appeals, 1980); Simonson v. United Press Intern., Inc., 500 F. Supp. 1261, 1265 (E.D. Wis., 1980).

Wisconsin also recognizes torts for the intentional infliction of emotional distress. Laska v. Steinpreis, 69 Wis. 2d 307, 231 N.W. 2d 196 (1975). It is very unlikely, under the rule of Laska, that Busche would have satisfied all of the elements necessary for a recovery based on emotional distress.

These questions will not be argued fully at this point. It is sufficient to note Petioner's belief that these cases are not generally inconsistent with the federal policies of compensation and deterrence and so should have been applied in the instant case even though the Plaintiff would have been disadvantaged thereby.

The Petitioner also notes at this point, that he is not contesting the award of punitive damages. The principles of compensation and deterrence thus remain, under the circumstances of the instant case, specifically as well as generally intact.

A.4. The Petition Should Be Granted In Order To Resolve An Apparent Inconsistency Between Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) And Later Case Law Construing Sec. 1988's Applicability To Sec. 1983.

Sullivan v. Little Hunting Park, supra, involved a suit for injunctive relief and damages brought under 42 U.S.C. sec. 1981 and sec. 1982. Section 1982, by its terms, did not provide for damages and so this Court looked to sec. 1988. This Court concluded:

> "This means, as we read sec. 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes... . The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need wherever a federal right is impaired. We do not explore the problem further, as the issue of damages was not litigated below." Id., at 240.

This Court, in Moor v. County of Alameda, 411 U.S. 693, 703-4 (1973) found the Sullivan language applicable to damage actions generally under the civil rights statutes, including sec. 1983.

This passage has led to confusion within the Federal Courts. At lease one circuit, Baskin v. Parker, 602 F.2d 1205, 1209 (5th Cir., 1979) has adopted this passage as controlling choice of law questions in actions for damages under sec. 1983. Other circuits, such as the 7th, apparently disregard it. It has even been

suggested, Carrigan v. Central Adjustment Bureau, 502 F.Supp. 468, 471, n. 2 (N.D. Ga., 1980), that this passage establishes a federal common law of damages for the violation of any federal statute.

The Petitioner submits that should this Court accept his argument, this confusion could be resolved. The Sullivan language does not give courts the freedom to use whatever measure of damages they wish. It must be read with the statutory language of sec. 1988, and the Robertson and Tomanio cases. Such a reading would make clear that the proper method of proceeding under sec. 1988 would be to turn first to state law and, only where state law is found to be inconsistent with federal policy, resort to the "federal common law". This would be in keeping with the policy of this Court that the federal common law should be only a "necessary expedient". City of Milwaukee v. Illinois at 49 USLW 4448 (citing Committee for The Consideration of the Jones Falls Sewage System v. Train, 539 F. 2d, 1006, 1008 (4th Cir., 1976), (en banc).

A.5. The Petition Should Be Granted In Order To Provide A Definition To The "Common Law Of Torts" Used By This Court In Carey v.

Piphus, 435 U.S. 247, As The Starting Point For The Determination Of Damages In Sec. 1983 Actions.

> "It is less difficult to conclude that damages awards under sec. 1983 should be governed by the principle of compensation than it is to apply this principle to concrete cases. But over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under sec. 1983 as well." Id., 435 U.S. 257-258.

Carey left open the question of the source of this common law. Petitioner submits that this opinion is consistent with his reading of sec. 1988's applicability to sec. 1983. The source of this common law should be, in the first instance, state law. Only where the court has found state law to be inconsistent with federal policy, should it resort to a federal rule.

Petitioner respectfully notes that at lease two Justices of this Court believe that Carey establishes a federal common law of damages. See Robertson v. Wegmann, 436 U.S. at 589, n.5; see also Robertson, 436 U.S. at

596-597; (Blackmun J., dissenting). This however, was never made explicit in Carey, and, Petitioner asserts, the application of sec. 1988 to sec. 1983 damage actions was not the question before this Court in Carey. Petitioner thus submits that, should this petition be granted, this question could be resolved.

A.6. The Petition Should Be Granted Because The Decision Of The Court Of Appeals Is Contrary To The Policy Of This Court On Sec. 1983 Actions.

In Paul v. Davis, 424 U.S. 693 (1976), this Court stated:

> "But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have already noted the 'constitutional shoals' that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law; (cite omitted) a fortiori, the procedural guarantees of the Due Process Clause cannot be the source for such law." 424 U.S. at 701.

Petitioner submits that, should the 7th Circuit holding be allowed to stand, this basic policy of the Court would be violated. Federal courts would always feel free to disregard with impunity state law on questions of damages.

Respect for federal-state relations has

always been a policy of this Court with respect to the civil rights statutes. Justice Douglas, speaking for a plurality of this Court, found, in construing the criminal couterpart of sec. 1983, that the Fourteenth Amendment "did not alter the basic relations between the states and national government", and so Congress should not be understood to have "[made] all torts of state officials federal crimes". Screws v. United States, 325 U.S. 91, 109 (1945).

Likewise, this Court has recognized, based on the nature of the federal court system, that principles of federalism must govern sec. 1983 actions for equitable relief. Rizzo v. Goode, 423 U.S. 362, 379 (1976).

The policy of federalism developed by this Court is underscored by the nature of sec. 1983.

> "Unlike the 1866 and 1870 Acts, sec. 1 of the Civil Rights Act of 1871 did not provide for any substantive rights - equal or otherwise. As introduced and enacted it served only to insure that an individual had a cause of action for violations of the Constitution, which in the Fourteenth Amendment embodied and extended to all individuals as against state action the substantive protections afforded by sec. 1 of the 1866 Act. No matter how broad

> the sec. 1 cause of action may be, the breadth of its coverage does not alter its procedural character." Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617 (1979).

Petitioner submits that this Court has long recognized principles of federalism in sec. 1983 actions, A reading of sec. 1983 together with sec. 1988 on the question of choice of laws in damages is consistent with this policy. The Petitioner's reading of sec. 1983 is underscored by its procedural character. A procedural statute should not be found to govern choice of law questions where another statute (sec. 1988) accomplishes this task. The holding of the 7th Circuit is offensive to the policy of this Court and the nature of sec. 1983 and should therefore be reversed.

B. Should It Be Determined That Sec. 1983 Establishes A Federal Rule Of Damages Without Reference To Sec. 1988, The 7th Circuit Erred In Not Granting Any Consideration To State Law, And This Petition Should Be Granted For That Reason.

Even if it should be determined that sec. 1983 establishes a federal rule of damages, state law is still of relevance in determining the appropriate measure of damages.

In Burks v. Lasker, 441 U.S. 471 (1979), this Court was called upon to decide the appropriate rules of state and federal law in a controversy under the Investment Company and Investment Advisors Acts, 15 U.S.C. sec. 80 a-1 et sq.; 15 U.S.C. sec. 80 b-1 et sq..

The Court assumed, without deciding, that the litigants had an implied federal cause of action under the statutes. The Court then stated:

> "The fact that 'the scope of [respondents] federal right is, of course, a federal question", does not, however, make state law irrelevant (cite omitted). It is true that in certain areas we have held that federal statutes authorize the federal courts to fashion a complete body of federal law (cite omitted). Corporation law, however, is not such an area." Id., at 477.

Petitioner submits that the relationship of state tort law to sec. 1983 is analogous. Monroe v. Pape, supra, found that sec. 1983 "should be read against the background of tort liability". Likewise, Carey v. Piphus, supra, found that the common law of torts should provide the starting point to any analysis of damages. 435 U.S. at 257-258.

Petitioner asserts that tort law is the province of the state to at least the same extent as corporation law. Thus, the Congress, in the Federal Tort Claims Act, recognized state tort law as the appropriate measure of damages. See 28 U.S.C. secs. 1346(b) and 2671-2680. Thus, this Court recognized in Parratt v. Taylor, ___U.S.___, 68 L.Ed. 2d 420, 101 S.Ct. ___,(1981) and Ingraham v. Wright, 430 U.S. 651 (1977), that state tort law had a role to play in remedying constitutional wrongs.

Petitioner also notes that regard for state law is not unique to Burks or state corporation law. See, for example, DeSylva v. Ballantine, 351 U.S. 570, 580 (1956) (state family law's application to federal copyright laws); Butner v. United States, 440 U.S. 48 (1979) (application of state property law to federal bankruptcy rules); and United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979)(application of state law in fixing priority for liens under federal loan programs). State tort law should not be treated differently under

sec. 1983.

The Burks Court laid down the following test in determining whether to apply state law in a given situation:

> "The foregoing indicates that the threshold inquiry for a federal court in this case should have been to determine whether state law permitted Fundamental's disinterested directors to terminate respondent's suit. If so, the next inquiry should have been whether such a state rule was consistent with the policy of the ICA and IAA. Neither the District Court nor the Court of Appeals decided the first question, apparently because neither considered state law particularly significant in determining the authority of the independent directors to terminate the action and in that circumstance, neither court addressed the question of consistency between state and federal law." Id., 441 U.S. at 480.

Petitioner asserts that this test applies to sec. 1983 actions for damages. The lower courts should have first determined whether Busche would have been permitted to recover under Wisconsin tort law. The court should then have determined whether the results of the first inquiry were consistent with federal policy. Petitioner asserts that Wisconsin tort law is generally consistent with federal policy and

thus should have been applied, even though Busche would have been disadvantaged thereby. "[A] state statute cannot be considered 'inconsistent' with federal .aw merely because the statute causes the plaintiff to lose the litigation." Id., at 479 (citing Robertson v. Wegmann, supra, at 593). Thus, the holding of the 7th Circuit must be reversed.

II. THE 7TH CIRCUIT IN THE INSTANT MATTER SO FAILED TO ADHERE TO PRINCIPLES OF PROXIMATE CAUSE AS TO VIOLATE THIS COURT'S HOLDING IN CAREY V. PIPHUS, 435 U.S. 247.

This Court indicated in Carey v. Piphus, supra, at 435 U.S. 254-260, that a showing of causation was a prerequisite to recovery in actions brought under 42 U.S.C. sec. 1983. It is quite clear that the Court intended traditional theories of proximate cause be embraced within its concept of causation. This Court left open the question whether state or federal rules of proximate cause should apply. Petitioner asserts that had the lower courts applied either rule of proximate cause to the instant case, the award of compensatory damages would have been substantially reduced or reversed.

Prosser has defined proximate cause thusly:

> "An essential element of the plaintiff's cause of action for negligence, or, for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered. This connection usually is dealt with by the courts in terms of what is called 'proximate cause' or 'legal cause'." Prosser, Law of Torts, 4th Ed., at 236.

Related to proximate cause is the notion of intervening cause. Intervening cause has been defined thusly:

> "On its face, the problem is one of whether the defendant is to be held liable for an injury to which he has in fact made a substantial contribution, when it is brought about by a later cause of independent origin, for which he is not responsible. In its essence, however, it becomes again a question of the extent of the defendant's original obligations and once more the problem is not one of causation at all, since it does not arise until causation is established. It is rather one of the policy as to imposing legal responsibility. The older cases tend to ask the question, why should the defendant be held liable for harm brought about by something for which he is not responsible. The later ones tended to ask instead, why should he be relieved of liability for something that he has caused, along with other causes? It is for this

> reason that the restatement has stated the problem in terms of whether there is a 'superseding cause'." Id., at 270-271.

Wisconsin has recognized that a showing of proximate cause is necessary to a recovery of compensatory damages in defamation actions. Laurent v. VanSomple, 161 Wis. 354, 154 N.W. 366 (1915); Bradley v. Cramer, 66 Wis 297, 28 N.W. 372 (1886). Likewise, causation is a prerequisite to recovery in suits brought for intentional infliction of emotional distress. Laska v. Steinpreis, supra, 69 Wis. 2d at 322; Alsteen v. Gehl, 21 Wis. 2d 349, 360, 124 N.W. 2d 312 (1963).

Proximate cause has been recognized as essential to recovery in sec. 1983 damage actions. See. e.g., Beard v. Mitchell, 604 F. 2d 485 (7th Cir., 1979); Lucia v. Duggan, 303 F.Supp. 112 (D. Mass., 1969). In Martinez v. California, 444 U.S. 277, 285 (1980), this Court decided that a parole officer could not be held liable for the remote consequences of his actions. The Supreme Court of Wyoming, Board of Trustees, Etc. v. Holso, 584 P. 2d 1009, 1019 (1978) rehearing denied, 587 P.2d 203 (1978), established

the following test:

(1) The plaintiff must show that he, in fact, suffered such damages; and,

(2) That defendant's action proximately caused plaintiff's injury.

Petitioner asserts that the application of such a test in the instant case would have prevented recovery of compensatory damages for Busche's marital difficulties. The testimony appended (App. G) to this petition clearly indicates that Petitioner could not have been the proximate cause of these problems.

Similarly, the doctrines of proximate and intervening cause should be applied to reduce or reverse any award based on injury to Plaintiff suffered after his deprivation of due process was corrected by the Fire and Police Commission. As a matter of policy, injury should not be presumed to flow after a deprivation of due process has been righted. Likewise, damage to reputation based on newspaper coverage should be analyzed in terms of intervening cause.[2]

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[2]The Petitioner also notes that recovery should be denied because the underlying truth

The national interest also compels resolution of this question. The Carey Court found

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of the newspaper coverage was never disputed. The most recent case Petitioner could find on this question is Bell v. Gayle, 384 F.Supp. 1022 (N.D. Tex., 1974). Plaintiffs in Bell were dismissed from the Denver City, Texas, Police Department in violation of their rights to pretermination hearings because of activities of theirs invclving conflicts of interests. The court found the allegations of conflict of interest true and then considered the damage to reputation that plaintiffs suffered as a result.

> "There has been no defamation of character here to sustain any common law action. The newspaper article entered into this case stated that plaintiffs were released 'for letting outside activities interfere with police duties and on failure to perform police duties while on city time.' The court finds that this was the true reason for the discharge and this reason had a truthful basis. There can be no defamation of character when only the truth is spoken and no relief can be awarded plaintiffs on this ground." Caller Times Pub. Co. v. Chandler, 122 S.W. 2d 249 (Tex. Cir. App. 1938) aff'd 134 Tex. 1, 130 S.W. 2d 853, (1939); Brinkley v. Fishbein, 110 F.2d 62, (5th Cir., 1940) cert. den.311 U.S. 672, 61 S.Ct. 34, 85 L.Ed. 2d 432 (1940), Id., at 1027.

Petitioner notes firstly that the Bell Court apparently used state law as the measure of damages. Petitioner asserts that had Wisconsin law of defamation been utilized by analogy, that recovery would have been denied. supra, at 22

Petitioner asserts that Bell is directly on point with the instant case. This petition should therefore be granted to resolve this inconsistency. National interest also compels a resolution of this question. As sec. 1983 actions burgeon on the federal docket, it is important to litigants

that damages under sec. 1983 actions should be treated in a manner analogous to tort actions. Should it be found that reference should not be had to state law, federal courts will require guidance on these issues. Only this Court is equipped to provide such authoritative guidance.

Petitioner also notes that the trial court apparently based part of its award on changes in Busche's drinking habits (Finding of Fact 73). Petitioner asserts that an award based on these grounds should be reversed.

It is noted firstly that Petitioner was not the proximate cause of this. Busche testi-

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and the federal courts to know whether publicity surrounding a deprivation of due process can ever be considered as an element of damages where there is no underlying factual dispute.

The Petitioner suggests one decision of the Court for guidance. Codd v. Velger, 429 U.S. 624 (1977) raised the question whether the release of damaging information without a hearing from a terminated employee's personnel file constituted a denial of due process. The Court found it unnecessary to decide this question because the truth of the information contained within the file was never questioned. Hence, the plaintiff suffered no injury. This reasoning should be extended to cover factual settings similar to the instant.

fied (Tr. Vol. VI, pp. 384-385), that his drinking actually increased during his lawful suspension because he did not have a job and felt sorry for himself. (See App. H)

Further, reasons of public policy caution against awards of damages based on drinking problems. If such awards are to be allowable at all, they should only be granted upon testimony of expert witnesses that plaintiff became an alcoholic through the defendant's actions. It is noted that alcoholism is defined as a disease in Wisconsin. 51.01(1), Wisconsin Statutes. Any other holding would allow sheer speculation to take the place of sound analysis.

III. PLAINTIFFS WHO HAVE ADMITTED TO AND HAVE BEEN FOUND GUILTY OF WRONGDOING IN A PROMPT DUE PROCESS HEARING WOULD BE UNJUSTLY ENRICHED UNDER THE RULE OF CAREY v. PIPHUS IF ALLOWED TO RECEIVE COMPENSATORY DAMAGES.

Petitioner also asserts that to allow a plaintiff to recover compensatory damages where he admitted to and has been lawfully found guilty of wrongdoing would be unjust enrichment in violation of Carey v. Piphus.

The Carey Court stated:

"In this case, the Court of Appeals

> held that if petitioners can prove on remand that '[respondents] would have been suspended even if a proper hearing had been held,' 545 F.2d at 32, then respondents will not be entitled to recover damages to compensate them for injuries caused by the suspensions. The court thought that in such a case, the failure to accord procedural due process could not properly be viewed as the cause of the suspensions. (cites omitted). The court suggested that in such circumstances, an award of damages for injuries caused by the suspensions would constitute a windfall, rather than compensation, to respondents. (cites omitted). We do not understand the parties to disagree with this conclusion. Nor do we." Id., 435 U.S. at 260.

Petitioner asserts that the instant case falls within this teaching of Carey. Although the Police and Fire Commission did not penalize Busche to the identical extent, he was nonetheless suspended for sixty days. The lawfulness of this suspension has been established. Likewise, Busche admitted to his wrongdoing. Therefore, although Busche did not receive the identical penalty he would have, had the deprivation of due process gone unchallenged, to allow him to collect compensatory damages would be unjust enrichment under the rule of Carey.

IV. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION REQUIRES A FEDERAL DISTRICT COURT TO PROVIDE A PARTY WITH AN ADVERSARY HEARING ON THE QUESTION OF THE AMOUNT OF ATTORNEY'S FEES WHERE A REMAND BY THE COURT OF APPEALS HAS RAISED ADDITIONAL QUESTIONS OF DISPUTED FACT.

Petitioner currently has a motion before the District Court to provide him with an adversary hearing on the question of the amount of the attorney's fee award under 42 U.S.C. sec. 1988. Petitioner recognizes that should the District Court grant the motion, this question presented would become moot. If, however, the District Court denies the motion, Petitioner submits that this Court should, in the interest of judicial economy, review this question with the other questions presented.

The Court of Appeals rejected the standard employed by the trial court to set attorney's fees. It replaced this standard with one drawn from Muscare v. Quinn, 614 F.2d 577 (7th Cir., 1980). The Court of Appeals stated:

> "[Muscare] held, in part on the authority of Hughes [v. Repko, 578 F. 2d 483 (3rd Cir., 1978)] that attorney's fees should be awarded under sec. 1988 only for preparation and presentation of the claims on which a plaintiff is determined to

to have prevailed. See also Nadeau v. Helgemoe, 581 F.2d at 279 ("the amount of attorney's fees [prevailing plaintiffs] received should be based on the work performed on the issues in which they were successful.") slip op., at 21.

The Muscare Court drew its standards from Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1322 (7th Cir., 1974) cert den., 425 U.S. 997 (1976). Muscare, 614 F.2d at 579, citing to Waters, stated:

> "In fashioning a method of analysis to assist in determining the amount of attorney fees properly to be awarded in a Title VII action, we cannot subscribe to the view that attorney fees are to be determined solely on the basis of a formula applying hours spent times billing rate. We recognize, however, that such a factor is a consideration in making the ultimate award and indeed it is a convenient starting point from which adjustments can be made for various other elements. Other elements to be considered are set out in The Code of Professional Responsibility as adopted by the American Bar Association:
>
> Factors to be considered as guides in determining the reasonableness of a fee include the following:
> "(1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the service properly.
> "(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
> "(3) The fee customarily charged in

> the locality for similar legal services.
> "(4) The Amount involved and the results obtained.
> "(5) The time limitations imposed by the client or by the circumstances.
> "(6) The nature and length of the professional relationship with the client.
> "(7) The experience, reputation and ability of the lawyer or lawyers performing the services.
> "(8) Whther the fee is fixed or contingent. "Disciplinary Rule 2-106."

The Petitioner sought to have the Court of Appeals require, on remand, the District Court to provide a full due process, adversary hearing on the issue of attorney's fees. The Court of Appeals responded:

> "Burkee also requests that he be afforded a hearing on remand of the attorney's fees computation. In Murphy v. Kolovitz, slip op., at 2, this court noted that the district court may, in its discretion, request written briefing in lieu of a hearing on the determination of appropriate attorney's fees. Of course, whether or not a hearing is held, Burkee must be allowed sufficient opportunity to contest plaintiff's fee request. Cf Konczak v. Tyrrell, 603 F.2d 13, 19 (7th Cir., 1979)("Considering the depth of the briefing, a hearing on attorney's fees was unnecessary")" slip op., at 21, n. 15.

Petitioner submits that an adversary hearing must be granted in the instant matter. This is because the Court of Appeals imposed a new standard requiring resolution of factual ques-

tions not previously in dispute. These questions turn on what constitutes the amount of "work performed on the issues in which [plaintiff] was successful". slip op., at 21 citing to Nadeau v. Helgemoe, 581 F.2d at 279. Busche has submitted a brief to the District Court seeking recovery for certain items contained in his affidavit on attorney's fees. Petitioner challenges certain of these hours as unrelated to issues upon which Plaintiff ultimately prevailed. Petitioner submits that these questions can only be resolved in a full adversary hearing.

Petitioner likewise submits that standards (3) and (8) of Muscare, made the law of the case by the Court of Appeals, present unresolved factual questions which can only be settled through a full due process hearing.

Petitioner notes that the cases relied upon by the Court of Appeals in its holding that a hearing was within the discretion of the District Court are distinguishable. There was no factual dispute underlying the award of attorney's fees in Murphy v. Kolovitz, 635

F.2d 662 (7th Cir., 1981). Although Petitioner is unable to discern whether a factual dispute existed in Konczak v. Tyrrell, 603 F.2d 13 (7th Cir., 1979), he notes that the Konczak Court did not mention that a dispute existed.

Petitioner submits that the due process provision of the Fifth Amendment mandates an adversary hearing on the amount of attorney's fees where factual issues are in dispute. A substantial property interest of Petitioner's is at stake; the amount of attorney's fees Busche is seeking for the trial and appeal of the instant case is nearly double the award of compensatory and punitive damages. A resolution of factual disputes on briefs and affidavits, without affording Petitioner the opportunity to examine witnesses in an adversary hearing, would deprive Petitioner of his property without due process.

This Court has stated:

> "The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of due process law." Garfield v. United States ex rel. Goldsby, 211 U.S. 249, 262 (1908).

(See also Caton Ridge Nursing Home v. Califano, 447 F.Supp. 1222, 1224 (D.Md., 1978). This right includes the right to present evidence and to have judicial findings based on it. Baltimore & Ohio R. Co. v. United States, 298 U.S. 349, 368-69 (1936). Petitioner submits that the District Court's refusal to grant an adversary hearing on the issue of attorney's fees would deprive him of the right to present evidence on a question affecting his property interests.

Petitioner notes that this Court has found that, in order to satisfy due process, adversary hearings are necessary in a variety of other contexts. See, e.g., Kent v. United States, 383 U.S. 541 (1966) (Juvenile Court Proceedings); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) (Deportation Proceedings); and Cooke v. United States, 267 U.S. 517 (1925) (Contempt Proceedings where the act of contempt occurred outside of the courtroom). Petitioner asserts that his right to due process of law is as strong as those of the above cited cases; he should therefore likewise be accorded a due process hearing before an award of attorney's fees is assessed

against him.

Petitioner submits that this Court should also consider the closely analogous case law that has developed under the Fourteenth Amendment Due Process Clause as appropriate to a resolution of this question.

The Court has stated:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

Only an adversary hearing is appropriate to the nature of the instant case; Petitioner is about to be deprived of a substantial amount of his property by court judgment; he should first be allowed to contest, in an adversary hearing, the statements made by Plaintiff's attorney in his affidavit.

Petitioner notes that such a holding would be in accord with other rulings of this Court on the type of hearing demanded by due process law.

In Sniadach v. Family Finance Corp of Bay View, 395 U.S. 337 (1969), this Court voided as a denial of due process, a Wisconsin Statute which allowed a plaintiff to garnish a defendant's wages without prior notice or hearing. In Goldberg v. Kelly, 397 U.S. 254, 269 (1970), this Court found that "where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses". (cites omitted). In Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972), this Court found the right to property to be a basic civil right. In Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978), this Court found that utility customers had a property interest, under Tennessee law, in their utility service of which they could not be deprived without a due process hearing. Petitioner asserts that his property interest is as great as any of those cited above; thus, where factual disputes remain, he should not be deprived of this property interest without an adversary hearing.

It is noted that at least one Federal

Court has found that due process required, at least in some circumstances, an evidentiary hearing in an award of attorney's fees. Sargeant v. Sharp, 579 F.2d 645, 657 (1st Cir., 1978). Although the Sargeant Court did not find that an evidentiary hearing was mandated every time an award of attorney's fees is contested, it did find that due process required one under the circumstances of the case. Petitioner submits that due process likewise requires an evidentiary hearing whenever there are unresolved questins of fact.

Petitioner also cites, by way of analogy, Federal Rule of Civil Procedure 56, the rule governing determination of motions for summary judgment.

Under Rule 56, a party may be granted summary judgment only where:

> "[T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact...". Id.

Courts have found that this rule means what it says. Summary judgment may not be

given "on a new issue as to which the opposite party had no opportunity to present a defense before the trial court". Fountain v. Filson, 336 U.S. 681, 683 (1949). reh. den., 337 U.S. 921. "Where there is a dispute over a genuine issue of fact, summary judgment is inappropriate." Meredith v. Hardy, 554 F.2d 764, 765 (5th Cir., 1977). "A court may not resolve disputed issues of fact in ruling on a summary judgment motion." Felix v. Young, 536 F.2d 1126, 1130 (6th Cir., 1976).

Petitioner asserts that, by analogy, since disputed questions of fact have been raised by the remand, an adversary hearing should be provided in order to fix the appropriate amount of attorney's fees.

It is noted that at least one Federal Court has apparently used this method to determine whether an evidentiary hearing is required. Relying on Lindy Bros Builders of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir., 1973) the Court stated:

"Lindy I does not mandate an evi-

> dentiary hearing in all cases. The Lindy language on which defendants divine an exception from Rule 56 is the following passage:
>
> 'Opposing interests should be afforded a hearing to provide an evidentiary basis for resolution of disputed factual matters.' 487 F.2d at 169 (emphasis supplied).
>
> The import of this statement could not be more plain. An evidentiary hearing is required when material facts are disputed." Imprisoned Citizens Union v. Shapp, 473 F.Supp. 1017, 1021 (E.D. Pa., 1979).

Determinations whether to provide evidentiary hearings on requests for attorney's fees should be handled in this manner. Where disputed questions of fact exist, evidentiary hearings should be provided.

It is finally noted that this Court has required evidentiary hearings in the determination of attorney's fees awards under other Federal statutes. See, Perkins v. Standard Oil Co. of Calif., 399 U.S. 222, 223 (1970), construing the attorney's fees provision of the Clayton Antitrust Act, 15 U.S.C. sec. 15. Likewise, Petitioner submits a due process hearing should be required in the instant case.

In conclusion, Petitioner asserts that for the reasons outlined above, this Court should

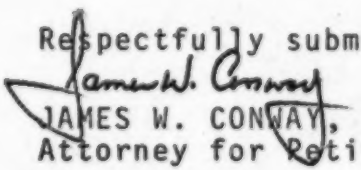
require a due process hearing where an award of attorney's fees under 42 U.S.C. sec. 1988 hinges on the resolution of disputed facts.

CONCLUSION

Petitioner respectfully requests, for the reasons outlined above, that this Court grant his petition for a Writ of Certiorari to the Court of Appeals for the 7th Circuit.

Petitioner notes that, if he should prevail on the merits in the instant proceeding, this Court should accordingly remand the lower Court's awards of attorney's fees and court costs.

Respectfully submitted,



JAMES W. CONWAY,
Attorney for Petitioner.

August 7, 1981.

Appendix

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81-283

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
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APPENDICES

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1981.

No. _____

* *

WALLACE E. BURKEE,

Petitioner,

vs.

ROBERT L. BUSCHE,

Respondent.

* *

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

James W. Conway,
City Attorney,
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625 - 52nd Street,
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Counsel for Petitioner.

APPENDIX A

Constitutional and Statutory Provisions Involved

CONSTITUTION
of the
UNITED STATES OF AMERICA

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42 U.S.C.S. Sec. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be

subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

42 U.S.C.S. Sec. 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS", and of Title "CRIMES", for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not

inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes [42 USCS secs. 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS secs. 1681 et seq.], or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 USCS secs. 1 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS secs. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 80-1248 & 80-1345

ROBERT LESLIE BUSCHE,

Plaintiff-Appellee, Cross-Appellant,

v.

WALLACE E. BURKEE,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court for the Eastern District of Wisconsin.
No. 76-C-559—John W. Reynolds, *Judge.*

ARGUED JANUARY 7, 1981—DECIDED MAY 21, 1981

Before CUMMINGS and CUDAHY, *Circuit Judges*, and BONSAL, *Senior District Judge.**

CUDAHY, *Circuit Judge.* This case arises out of the August 12, 1974 termination of plaintiff-appellee, cross-appellant Robert Leslie Busche from his employment as a police officer for the City of Kenosha, Wisconsin. The district court found that this termination violated Busche's due process rights under the Fourteenth Amendment to the United States Constitution and awarded compensatory and punitive damages, attorney's fees and

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* The Honorable Dudley B. Bonsal, Senior District Judge for the Southern District of New York, is sitting by designation.

costs to Busche.[1] Defendant-appellant, cross-appellee Wallace E. Burkee, the former mayor of Kenosha, does not contest the district court's finding that Busche was terminated without due process. Burkee appeals only from the amount of damages, fees and costs awarded to Busche. On cross-appeal, Busche challenges other aspects of the district court's judgment. We affirm the district court, except for its award of attorney's fees, which is remanded for further consideration in light of our opinion in *Muscare v. Quinn*, 614 F.2d 577 (7th Cir. 1980).

I.

Robert Leslie Busche joined the Kenosha police department as a patrolman on May 1, 1969.[2] One of his responsibilities as a patrolman was to complete State of Wisconsin motor vehicle forms entitled "Application for Registration and Certificate of Title" ("Section 2101 forms"). On the back of these forms, which were used to register cars that were new or registered in a different county, the following instructions appear in a box designated "Law Enforcement Officer's Certificate of Inspection": "Identification of Engine and Serial numbers must be taken directly from vehicle. This is to certify that I have personally checked the vehicle described on the reverse side of this application and found the numbers to be: ——."

Sometime in May 1974, Robert L. Bosman, the Kenosha Chief of Police, was informed by a Federal Bureau of Investigation ("FBI") agent that Busche and Thomas A. Fredericksen, also a Kenosha police officer, were cooperating in a federal grand jury investigation of an inter-

[1] The district court's opinions in this case are published at 474 F. Supp. 484 (E.D. Wis. 1979) (liability, compensatory and punitive damages) and 483 F. Supp. 1326 (E.D. Wis. 1980) (attorney's fees).

[2] These facts are drawn from the district court's findings, which, with the exception of the findings relating to damages, Burkee does not dispute.

state car theft conspiracy. The Kenosha police department joined in this investigation, which focused, *inter alia*, on the activities of Busche, Fredericksen and Leslie Eugene White, the owner of White Auto Sales, a car dealership located a few miles outside the Kenosha city limits. Bosman learned from this investigation that Busche and Fredericksen were alleged to have signed 2101 forms for White without physically inspecting the identification numbers of the vehicles for which the 2101 forms were prepared.

In an eleven count indictment returned on August 5, 1974 against White and others, Busche and Fredericksen were named as unindicted co-conspirators in the car theft ring because of their role in signing 2101 forms for White.[3]

After learning of this indictment from an article in the August 6, 1974, Milwaukee Sentinel, Mayor Burkee called Bosman to inquire about Busche's and Fredericksen's involvement in the activities described in the indictment. Bosman informed Burkee that the police department had been investigating the matter in conjunction with the FBI since May 1974. Also on August 6, 1974, after consultation with his staff, Bosman decided to suspend Busche with pay until the investigation was completed.

Sometime between August 6, 1974 and August 9, 1974, Mayor Burkee verbally instructed Bosman to terminate Busche's employment. Bosman informed the

[3] Paragraph 3-D of the grand jury indictment reads:

> D. As a further part of the scheme to defraud, Defendant LESLIE EUGENE WHITE, a/k/a/ TINY WHITE, obtained the services of THOMAS A. FREDERICKSEN AND ROBERT LESLIE BUSCHE, officers of the Kenosha, Wisconsin, Police Department, not named as defendants herein, to sign applications for registration and certificate of title forms of the Division of Motor Vehicles, Department of Transportation of the State of Wisconsin. The defendant, LESLIE EUGENE WHITE, a/k/a/ TINY WHITE, offered and gave money to said Thomas A. Fredericksen and offered money to said Robert Leslie Busche.

Mayor that, under Wisconsin law, Busche could not be terminated without a hearing before the Kenosha Police and Fire Commission (the "Commission").[4] Burkee, however, insisted that Busche be terminated without a hearing, stating to Bosman, "Do you want a couple of crooks on the Police Department?"

At a second meeting on August 9, 1974, Mayor Burkee again ordered Bosman to terminate Busche's employment, and said in reference to Busche and Fredericksen, "These men will never be police officers in this city again." At that meeting, Inspector of Police Joseph H.

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[4] Wis. Stat. § 62.13 (1977), to which Bosman referred, provides in relevant part:

> (5) DISCIPLINARY ACTIONS AGAINST SUBORDINATES.
> (a) A subordinate may be suspended as hereinafter provided as a penalty. He may also be suspended by the commission pending the disposition of charges filed against him.
> (b) Charges may be filed against a subordinate by the chief [of Police], by a member of the board [of Police and Fire Commissioners], by the board as a body, or by any aggrieved person. Such charges shall be in writing and shall be filed with the president of the board. Pending disposition of such charges, the board or chief may suspend such subordinate.
> . . . .
> (d) Following the filing of charges in any case, a copy thereof shall be served upon the person charged. The board shall set date for hearing not less than 10 days nor more than 30 days following service of charges. The hearing on the charges shall be public, and both the accused and the complainant may be represented by an attorney and may compel the attendance of witnesses by subpoenas . . . .
> (e) If the board determines that the charges are not sustained, the accused, if he has been suspended, shall be immediately reinstated and all lost pay restored. If the board determines that the charges are sustained, the accused, by order of the board, may be suspended or reduced in rank, or suspended and reduced in rank, or removed, as the good of the service may require.
> . . . .
> (h) No person shall be deprived of compensation while suspended pending disposition of charges.

Trotta also informed Burkee that it would be unfair and unjust to terminate Busche and Fredericksen without a hearing. At the direction of Burkee, Busche and Fredericksen were given the option of resigning by August 12, 1974 or being terminated. Neither Busche nor Fredericksen resigned. On August 12, 1974, Bosman sent written notices of termination to both men.[5]

At the time he was terminated, Busche received a copy of the charges that Bosman had simultaneously filed with the Kenosha Police and Fire Commission. These charges requested the Commission to "uphold the discharge of ROBERT L. BUSCHE pursuant to Section 62.13 of the Wisconsin Statutes."

Busche made a written demand for a hearing before the Commission on August 15, 1974. The president of the Commission notified Busche on August 26, 1974 that a hearing would be held on September 11, 1974. At that hearing, the Commission ordered Busche and Fredericksen to be reinstated with back pay after determining that it was improper for them to have been terminated before a decision on the merits of their cases had been rendered by the Commission. At his hearing, Busche testified that he had signed blank 2101 forms for White. On September 22, 1974, after three days of hearings, the

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[5] Although Busche's notice of termination was signed and delivered by Bosman, the district court found that Bosman felt "compelled" to obey Burkee's verbal order to terminate Busche. 474 F. Supp. at 489.

> Chief Bosman was of the opinion that he was a police officer as well as a Police Chief in August of 1974, and that he was bound by the rules and regulations of the Kenosha Police Department, and he was of the opinion that Rule 7, then in effect, spelled out a procedure to use under such circumstances, namely, to bring the unlawful order to the attention of the Mayor as head of the Police Department and then to obey said order.

Id. at 490. At another point in its opinion, however, the district court stated that Bosman knew he "had the obligation to obey any *lawful* order of the Mayor through his knowledge of the Wisconsin Statutes." *Id.* at 489 (emphasis supplied).

Commission ordered that Busche be suspended for sixty days without pay or benefits. Although Busche had the right to appeal this decision to the Kenosha County Circuit Court, he did not do so.

On August 9, 1976, Busche filed a complaint in federal district court alleging that Burkee, Bosman, Trotta and the five members of the Commission had violated his rights under the due process clause of the Fourteenth Amendment to the United States Constitution. By stipulation, plaintiff's action was dismissed against all defendants except Bosman and Burkee. After a three day trial, the district court dismissed the action against Bosman with prejudice and found Burkee liable for $10,000 in compensatory damages, $2,000 in punitive damages, reasonable attorney's fees and costs. In its final decision and order dated February 15, 1980, the district court affirmed its earlier decision and granted Busche's request for attorney's fees in the amount of $9,175.

Burkee filed a timely appeal from the district court's judgment, alleging that the district court wrongly assessed damages, fees and costs. On cross-appeal, Busche challenges the district court's rejection of his claims concerning the constitutional sufficiency of the Commission hearing and the allegedly selective prosecution of Busche and Fredericksen. Busche also challenges the district court's dismissal of Bosman from this action.

II.

Busche challenges the constitutional sufficiency both of the charges filed against him before the Commission and of the Commission's written statement of the evidence relied on and the reasons for its decision.

Due process requires that a person receive notice of charges brought against him so that he may understand why he is being investigated and have an opportunity to prepare a response. *See Wolff v. McDonnell*, 418 U.S. 539, 564 (1974). The charges filed against Busche read, in relevant part:

> That ROBERT BUSCHE did, in his capacity as a Police Officer, make entries on a certificate, to-wit, Form 2101, entitled 'Vehicle Registration and Certificate of Title Application', from the Department of Motor Vehicles, Division of Transportation of the State of Wisconsin, which, in a material sense, he intentionally falsified and he knowingly made false statements on said application for certificate of title in that in May of 1973 the said ROBERT BUSCHE did sign for White Auto Sales located in Kenosha County, a number of the said 2101 forms wherein he certified that he had inspected serial numbers of motor vehicles when, in fact, he had signed and certified said 2101 forms in blank without making an inspection of any motor vehicle; that said acts by the said ROBERT BUSCHE were in violation of Section 342.06(2) and 946.12(4) of the Wisconsin Statutes and Rules numbered three (3), sixteen (16) and twenty-seven (27) of the General Rules and Regulations of the Kenosha Police Department, Revised January 30, 1967, Kenosha, Wisconsin.

The district court found that this notice was insufficient, since it "failed to provide [Busche] with a statement of the evidence which would be presented with respect to the charges." 474 F. Supp. at 486. The court concluded, however, that Busche had waived any objection to the sufficiency of the notice when he declined the Commission's offer of an adjournment for the purpose of receiving an elaboration of the charges. The district court also found that Busche was not prejudiced by the incomplete notice since "he had sufficient time to prepare for the hearing, and . . . was able to present all of the evidence which he wished presented." *Id.*

Without deciding whether Busche waived his right to challenge the sufficiency of the notice,[6] we believe the

[6] Busche argues with ample support from record evidence that he was in severe financial difficulty in September 1974 because of his termination without pay. He therefore maintains that it is improper to characterize his rejection of the

(Footnote continued on following page)

district court properly found that Busche was not prejudiced by the incomplete charges. He was well aware of the nature of the Commission's inquiry, since he had participated closely in the grand jury's investigation of the identical activities.[7] Both at trial and on appeal, Busche has been unable to identify any prejudice he suffered because of the insufficient notice. He cannot identify any witnesses or physical evidence he might have presented had he received more complete notice. Moreover, at the Commission hearing itself, the district court found that Busche admitted he had "on a few occasions signed 2101 forms in blank." 474 F. Supp. at 491. Although this admission did not operate to waive Busche's due process rights, it is persuasive evidence that he was not prejudiced by the failure of the charges filed against him to list the evidence that would be presented before the Commission. *See Behan v. City of Dover*, 419 F. Supp. 562, 566-69 (D. Del. 1976), *aff'd* 559 F.2d 1207 (3rd Cir. 1977). We agree with the district court that Busche suffered no compensable deprivation of due process as a result of the incomplete notice he received from Bosman.

Busche also contends that the Commission's written findings and conclusions were constitutionally deficient. Those findings read:

> THE COMMISSION FINDS:
>
> Based upon the testimony and exhibits having been presented before the Commission that Officer Robert Busche, during the period May, 1973 through July, 1973, did intentionally sign, for White's Auto Sales,

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[6] *continued*
Commission's adjournment offer as a waiver, since his economic circumstances did not permit him to further postpone the hearing that he properly should have had before his termination. We do not decide whether these circumstances are sufficient to require rejection of the district court's determination that Busche voluntarily relinquished his right to challenge the sufficiency of the notice.

[7] Busche testified at trial that the Commission did not question him about any 2101 forms prepared in connection with any vehicles that he had not previously discussed with the FBI.

> located in Kenosha County, and Leslie Eugene White, approximately five (5) Form 2101, [sic] of the Division of Motor Vehicles, Department of Transportation, State of Wisconsin, entitled 'Vehicle Registration and Certificate of Title Application' in blank, without making any inspection of any motor vehicle, and thereby made knowingly false statements on said application for certificate of title.
>
> THE COMMISSION DETERMINES:
>
> That such conduct on the part of Officer Robert Busche violated Rules numbered three (3) and sixteen (16) of the General Rules and Regulations of the Kenosha Police Department, revised January 30, 1967, Kenosha, Wisconsin, and is an apparent violation of Section 342.06(2) and 946.12(4) of the Wisconsin Statutes.

The district court found that these findings, although they could have been more specific, were "minimally sufficient." 474 F. Supp. at 486. We agree. A written statement by factfinders as to the evidence relied on and reasons for its decision serves several interests. It allows for more effective review of the factfinder's decision, helps to insure that the factfinder acts fairly, and protects the subject of the inquiry from "collateral consequences based on a misunderstanding of the nature of the original proceeding." *Wolff v. McDonnell*, 419 U.S. 539, 565 (1974). The written statement issued by the Commission does not disserve any of these interests to a degree necessary to find a due process violation. Busche does not allege that the findings and conclusions hampered his ability to take an appeal,[8] nor does he claim that the Commission's actions were arbitrary or unfair.

---

[8] Busche testified at trial that he decided not to appeal the Commission's determination to the Kenosha County Circuit Court because he feared that the circuit court might order a rehearing which could have resulted in a longer suspension or termination. He did not indicate that he was deterred from taking an appeal because of the insufficiency of the Commission's written statement.

And we believe that Busche's promotion to sergeant of the Kenosha Police Department on September 1, 1978 by a unanimous vote of the Commission demonstrates that Busche has not suffered unwarranted collateral consequences because of the Commission's allegedly insufficient written findings and conclusions.[9]

Busche also argues that the record of the sixty day suspension should be expunged because the district court found that the Commission's hearing "denied the plaintiff a meaningful opportunity to be heard." 474 F. Supp. at 494. This argument is without merit since it is based on a misreading of the district court's opinion. The district court found only that the Commission hearing did not "cure" the due process violation that arose from Busche's unlawful August 12, 1974 termination. The district court explicitly determined that the Commission hearing itself met the requirements of due process. 474 F. Supp. at 486. We reject any suggestion in Busche's argument that the Commission was forever barred from conducting a constitutionally valid investigation simply because his initial termination was constitutionally infirm. *See Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470, 494 (3rd Cir. 1978), *cert. denied*, 444 U.S. 832 (1979); *Jones v. Snead*, 431 F.2d 1115, 1117 (8th Cir. 1970).[10]

---

[9] Busche argues that his July 2, 1975 applications for the positions of sergeant and juvenile investigator would have been accepted but for the record of his suspension. There is sufficient evidence, however, to support the district court's conclusion that "Bosman would not have appointed Busche to any of said openings filled on August 1, 1975, as he felt the other appointed applicants were more qualified, and this would have occurred whether or not Busche was charged and disciplined. . . ." 474 F.Supp. at 493.

[10] Busche also contends that he was selectively prosecuted in violation of his equal protection and due process rights because five other officers who engaged in similar conduct were not prosecuted. We approve the district court's disposition of this claim:

> With regard to plaintiff's claim of selective prosecution, the Court has no doubt that the impetus for plaintiff's ter-

(Footnote continued on following page)

Busche also challenges the dismissal of Bosman from this action. The district court found that Bosman "acted merely as an agent of . . . Burkee in terminating the plaintiff from employment on August 12, 1974, and is therefore not liable for violation of plaintiff's constitutional rights." 474 F. Supp. at 494. We reject this broad conclusion to the extent it may imply that an individual is relieved of personal responsibility for perpetrating unlawful acts against another simply because he is acting as an agent or subject to a superior's orders. *See Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (per Mar-

[10] *continued*
mination from employment and for the Police and Fire Commission hearing was the federal indictment which named plaintiff as an unindicted co-conspirator. The Court also recognizes that plaintiff was never charged with or convicted of a criminal offense. The fact remains, however, that plaintiff had committed the acts for which he was disciplined by the Commission, as had officer Fredericksen who was also disciplined, and that while there was evidence of other officers having improperly filled out 2101 vehicle registration forms, there was no evidence that other officers had filled out such forms in blank. Consequently, the Court believes that there was a legitimate basis for the charges against the plaintiff, that the Commission's findings were not arbitrary and capricious, and that no violation of the equal protection clause of the Fourteenth Amendment occurred.

474 F. Supp. at 486.

The Constitution does not require the state to choose between prosecuting every individual implicated in unlawful activity or prosecuting none of them. Where, as here, there is no evidence of class-based or racially-motivated discrimination, *cf. Yick Wo v. Hopkins*, 118 U.S. 356 (1885), and no governmental policy of non-prosecution, *cf. United States v. Falk*, 479 F.2d 616 (7th Cir. 1973), the state has wide latitude in selecting which wrongdoers it will prosecute. Busche and Fredericksen admitted to signing 2101 forms in blank, while the other officers admitted only to signing such forms without physically inspecting the vehicle's identification and registration numbers. In addition, since deterrence is one of the purposes of prosecution, the state may justifiably select for prosecution those individuals, such as Busche and Fredericksen, whose unlawful activity has received wide publicity.

shall, C.J.) (commander of an American warship liable in damages for unlawfully seizing the Flying Fish, a Danish brigantine, even though the seizure was made pursuant to a superior's instructions). We believe, however, that in the particular circumstances before us, the district court properly dismissed Bosman from this action.

It is clear from the record that Bosman made every reasonable effort to protect Busche's rights. First, although he had been investigating Busche's and Fredericksen's improper activities for four months prior to the issuance of the federal grand jury indictment, he did not initiate any disciplinary action during that period. On August 9, 1976, after the indictment was issued, Bosman suspended Busche and Fredericksen with pay pending completion of the investigation. This action was within the scope of Bosman's authority and we believe it was appropriate under the circumstances. Second, Bosman signed and delivered Busche's letter of termination only after being ordered twice to do so by the Mayor and only after informing the Mayor of his belief that the proposed termination was unlawful. The district court found that Bosman believed he was "compelled to obey the order because of certain rules and regulations in effect at the Kenosha Police Department." 474 F. Supp. at 489. These rules apparently provided that Bosman was to "bring the unlawful order to the attention of the Mayor as head of the Police Department and then to obey said order." 474 F. Supp. at 490. Third, Bosman requested the Commission to uphold Busche's discharge immediately after he delivered the termination letter.

But we think there is a more compelling factor, without which we would not be able to find agency to be sufficient for exculpation. For we note that, as Mayor, Burkee was head of the Kenosha Police Department, and his order requiring Busche's termination was not outside the range of normal personnel actions that an executive officer is, in general, empowered to undertake or initiate (with, of course, proper deference to procedural requirements). Burkee did not, for example, order corporal punishment or incarceration. Although Bosman held the

belief (which was subsequently proved correct) that Busche could not be discharged without a pre-termination hearing, it is unreasonable to expect that Bosman should have disobeyed the Mayor's direct order because of this belief, when Bosman also believed he was required by law to obey the Mayor's orders after informing the Mayor that he believed the orders to be unlawful, and when the Mayor's orders were not outside the range of normal personnel actions.[11]

III.

Burkee challenges the district court's award of compensatory and punitive damages, attorney's fees and costs. We shall consider each component of the award in sequence.

A. Compensatory damages

Damages are awarded in § 1983 actions to compensate individuals for injuries resulting from the deprivation of their constitutional rights. *Carey v. Piphus*, 435 U.S. 247, 254 (1978). And, since the protection afforded by § 1983 "was not intended by Congress to differ from state to state," *Basista v. Weir*, 340 F.2d 74, 86 (3rd Cir. 1965), federal, not state, common law governs the determination of damages in § 1983 actions. This federal law of damages must be fashioned to promote the purposes underlying the enactment of § 1983. As stated in *Carey v. Piphus*, 435 U.S. at 258-59 (citations omitted; brackets in original):

> The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action. In order to further the purpose of § 1983, the rules

[11] As the record indicates, Busche was granted a prompt post-termination hearing. And, as this action demonstrates, Busche could be compensated for injuries he suffered as a result of the deprivation of his procedural due process rights.

> governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question. . . . We agree with Mr. Justice Harlan that 'the experience of judges in dealing with private [tort] claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of [constitutional] rights.'

The amount of damages necessary to compensate an individual for the deprivation of constitutional rights is a question of fact and therefore not to be upset on appeal unless the district court's determination is clearly erroneous. Fed.R.Civ.P. 52(a); *First National Bank of Chicago v. Material Service Corp.*, 597 F.2d 1110, 1119 (7th Cir. 1979). We can find that a factual determination is clearly erroneous only if, after reviewing the entire record, we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

Burkee maintains that the district court's award of $10,000 was not justified by the evidence. This award was not based on out-of-pocket or other tangible losses but rather on damage to reputation and emotional distress that Busche suffered as a result of his unlawful termination. Compensation for such injuries must not be denied simply because it is not easily quantified. Conversely, such injuries cannot be presumed to flow from every deprivation of constitutional rights. Instead, plaintiff must prove the existence and magnitude of subjective injuries with "competent evidence." *Carey v. Piphus*, 435 U.S. at 264 n.20.[12]

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[12] Burkee suggests that the testimony of medical or psychiatric experts is necessary to establish a compensable emotional injury. While such testimony could have strengthened Busche's case, its absence from the record is not fatal to his claims. As the Supreme Court stated in *Carey v. Piphus*, 435 U.S. at 264 n.20, "[a]lthough essentially subjective, genuine injury in this respect [mental suffering or emotional anguish] may be evidenced by one's conduct and observed by others."

The district court found that Busche had a reputation as a hard-working and conscientious officer before he was unlawfully discharged. It found that this reputation was significantly tarnished by the publicity surrounding the termination. 474 F. Supp. at 493. The district court also found that "[f]ollowing his termination . . . plaintiff became severely depressed, changed his drinking habits and began to drink heavily, became moody and quarrelsome, had marital difficulties which eventually ended in divorce, and had financial difficulties due to his loss of income." *Id.* After carefully reviewing the record, we cannot say that the evidence of Busche's emotional distress and damaged reputation was insufficient to sustain the district court's finding that an award of $10,000 was necessary to properly compensate him for the deprivation of his due process rights. Such a determination is, by its nature, highly subjective.[13] Lacking the ability to

[13] At least part of the district court's finding of damage to Busche's reputation rests on the publicity surrounding the August 12, 1974 termination. Thus, the district court found:

> Whereas the publicity surrounding the August 6, 1974, suspension of the plaintiff created the impression in the minds of the public that plaintiff had been accused of committing a criminal act, the termination created the impression that he had been found guilty of committing a criminal act, and thus the publicity after August 12, 1974, was significantly more harmful to plaintiff's reputation than the publicity between August 6, 1974 and August 12, 1974.

474 F. Supp. at 490-91. Burkee contends that the district court erred in considering publicity about the termination as an element of damages without first finding that this publicity was untrue. This argument misapprehends the nature of plaintiff's § 1983 action. The wrongful act in the instant case was the unlawful termination of Busche, not the utterance of untruths. Plaintiff is entitled to fair compensation for injuries caused by the deprivation of his constitutional right to due process of law. *Carey v. Piphus*, 435 U.S. at 258. Therefore, the injury to Busche's reputation caused by the truthful (and forseeable) publicity of the unlawful termination was properly considered by the district court as an element of damages.

(Footnote continued on following page)

judge the credibility of plaintiff's eleven witnesses, we cannot say the district court's award was clearly erroneous.[14]

[13] *continued*

Defendant similarly misconceives the purpose of § 1983 damage awards in arguing that plaintiff must allege and prove the elements of the state tort of intentional infliction of emotional distress before recovering damages for mental and emotional anguish. Again, to be compensated for such damages in a § 1983 action, plaintiff need only demonstrate by competent evidence (as Busche did here) that the mental and emotional distress was caused by the denial of procedural due process. *See Carey v. Piphus*, 435 U.S. at 263-64.

Defendant also maintains that Busche's damages should be limited to those arising during the approximately thirty days between his unlawful termination and the Commission hearing. Burkee properly argues that he is not liable to Busche for any reputational damage or emotional suffering flowing from the August 9, 1974 suspension or from the sixty day suspension without pay ordered by the Commission, since neither of those suspensions violated Busche's right to due process of law. Burkee is liable, however, for any injuries that were the proximate result of the unlawful termination, regardless whether these injuries were manifested before or after the date of the Commission hearing. Thus, the district court properly

> took into consideration in making its award that not all of plaintiff's injuries were caused by the conduct of the defendant Burkee, and the damages assessed against Burkee were only those which the Court found to be attributable to his illegal conduct, i.e., to his initial termination of the plaintiff from employment.

483 F. Supp. at 1328.

[14] Burkee also argues that Busche should be awarded only nominal damages because he admitted at the Commission hearing that he had signed several 2101 forms in blank. This admission, however, does not undermine the foundation on which Busche's right to a hearing rests. A hearing is required in the due process context, *inter alia*, to protect against erroneous or unjustified deprivations of interests protected by the due process clause. *See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 13 (1979); *Carey v. Piphus*, 435 U.S. 247, 259 (1978). In the present case, the Commission's decision demonstrates that Burkee's termination of

(Footnote continued on following page)

B. Punitive damages

In its order dated August 15, 1979, the district court assessed $2,000 in punitive damages against Burkee because of his "willful and intentional violation of plaintiff's constitutional rights." Burkee does not dispute the authority of the district court to award punitive damages under § 1983 in an appropriate case. *See Carey v. Piphus*, 435 U.S. at 257 n.11. As with compensatory damages, the award of punitive damages is within the discretion of the trial court.

> The allowance of such damages inherently involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent. Therefore, the infliction of such damages, and the amount thereof when inflicted, are of necessity within the discretion of the trier of fact.

Stolberg v. Members of the Board of Trustees for the State Colleges of Connecticut, 474 F.2d 485, 489 (2d Cir. 1973) (quoting *Lee v. Southern Home Sites Corp.*, 429 F.2d 290, 294 (5th Cir. 1970)).

We believe the district court's award of punitive damages was not clearly erroneous. The record establishes that Burkee ordered Busche's discharge even though he had been repeatedly advised that he was without legal authority to do so. Both Chief of Police Bosman and Inspector of Police Trotta had informed Burkee that Busche could be terminated only after he received a

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[14] *continued*
Busche was unwarranted, since, after carefully weighing the evidence, the Commission determined that the proper penalty for Busche's improper acts was not termination but only a sixty day suspension without pay. Burkee's argument would have had merit only if the Mayor's decision to terminate Busche had been subsequently upheld by the Commission. *See Carey v. Piphus*, 435 U.S. at 260 ("if petitioners can prove on remand that '[respondents] would have been suspended even if a proper hearing had been held,' then respondents will not be entitled to recover damages to compensate them for injuries caused by the suspensions.") (citation omitted).

hearing before the Police and Fire Commission. This intentional and considered disregard of Busche's legal rights demonstrates that Burkee acted with the "malicious intent" necessary to support the district court's award of punitive damages. *See Konczak v. Tyrrell*, 603 F.2d 13, 18 (7th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980).

Burkee also argues that punitive damages were wrongly awarded because this was a unique and isolated incident which is unlikely to recur. He properly argues that a primary function of punitive damages is to deter similar future conduct. Although Burkee may not be in a position to perpetrate such unlawful conduct again (and certainly without attempting to divine Burkee's motives), we think the district court could have reasonably concluded that an award of punitive damages in this case might deter excutive officials in the future from willfully disregarding the legal rights of public employees in situations where such disregard might seem justified (and possibly politically compelled) in the heat of the moment.

C. Attorney's Fees

Busche requested $9,175 in attorney's fees, which represented 183.5 hours of work at $50 per hour. The district court awarded the full amount requested by Busche pursuant to the Civil Rights Attorney's Fees Awards Act, which provides that in civil rights actions under § 1983 and certain other statutes, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1976). This discretion is limited by the Act's legislative history, which provides that the successful plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S.Rep. No. 94-1011, 94th Cong., 2d Sess. 4, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5912 (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)).

Burkee does not contest the number of hours expended by Busche's attorneys or the reasonableness of the $50

hourly rate. Rather, he contends that the award was based on an erroneous understanding of the relevant legal standards. Fees should be awarded, Burkee urges, only to those parties who bring actions "in the capacity of private attorneys general" to enforce the civil rights statutes. He seeks, in effect, to limit the application of § 1988 to class actions that seek equitable relief. This narrow construction contradicts the unqualified language of the Act. Section 1988 explicitly extends to all § 1983 actions, without regard to the number of plaintiffs or type of relief sought. *See Konczak v. Tyrrell*, 603 F.2d 13 (7th Cir. 1979); Comment, *Attorney's Fees in Damage Actions Under the Civil Rights Attorney's Fees Awards Act of 1976*, 47 U. Chi. L. Rev. 332 (1980). A prevailing plaintiff in a § 1983 action "should receive fees almost as a matter of course," *Davis v. Murphy*, 587 F.2d 362, 364 (7th Cir. 1978), unless special circumstances render such an award unjust. Burkee has indicated no such circumstances in the present case.

Burkee also argues that the award of fees in this case was improper because Busche was not a "prevailing party" within the meaning of § 1988 since he did not succeed in his claims regarding the constitutional sufficiency of the Commission hearing and since all but one of the defendants were dismissed from the action. Busche need not prevail on every issue to be awarded attorney's fees under § 1988. Indeed, such a requirement would "stifle the presentation of innovative causes of action and would force courts to rule on every issue in a case, even if its rulings would be redundant." *Ohland v. City of Montpelier*, 467 F. Supp. 324, 349 (D. Vt. 1979). We note with approval the definition of prevailing party set forth by the First Circuit Court of Appeals in *Nadeau v. Helgemoe*, 581 F.2d 275, 278 (1st Cir. 1978): "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."

The district court must consider the individual circumstances of each case to determine whether a plaintiff is the "prevailing party" for purposes of § 1988. *Murphy v.*

Koloritz, No. 79-2441, slip op. at 2 (7th Cir. Jan. 7, 1981). We believe the district court's finding that Busche was the prevailing party here is not in error, since Busche succeeded in demonstrating that he suffered substantial injuries because of Burkee's intentional violation of his constitutional rights. While Busche did not succeed on all issues or against all defendants, it is significant that the existence and extent of Busche's injuries and the wilfulness of Burkee's illegal conduct were the major issues at trial.

Busche also argues that the district court should have applied the rule announced in *Hughes v. Repko*, 578 F.2d 483 (3rd Cir. 1978), which allows a prevailing party to recover fees only to the extent he is found to have prevailed in the suit. Under this rule, the prevailing party bears the burden of demonstrating to the district court the number of hours attributable to the prosecution of his successful claims. This calculation presumably includes time spent on unsuccessful claims to the extent such time would have been spent in connection with the successful claims even if the unsuccessful claims had not been brought. *See id.* at 487.

The district court did not adopt this formula, applying instead the following holding found in *Northcross v. Board of Education of Memphis*, 611 F.2d 624, 636 (6th Cir. 1979, *cert. denied*, 447 U.S. 911 (1980):

> The question as to whether the plaintiffs have prevailed is a preliminary determination, necessary before the statute comes into play at all. Once that issue is determined in the plaintiffs' favor, they are entitled to recover attorneys' fees for 'all time reasonably spent on a matter.' The fact that some of that time was spent in pursuing issues on [sic] research which was ultimately unproductive, rejected by the court, or mooted by intervening events is wholly irrelevant. So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation unless the positions asserted are in bad faith.

Although the rule announced in *Northcross* may have considerable merit, it seems at odds with the formulation adopted by this court in *Muscare v. Quinn*, 614 F.2d 577, 578-79 (7th Cir. 1980), which held, in part on the authority of *Hughes*, that attorney's fees should be awarded under § 1988 only for preparation and presentation of the claims on which a plaintiff is determined to have prevailed. *See also Nadeau v. Helgemoe*, 581 F.2d at 279 ("the amount of attorney's fees [prevailing plaintiffs] receive should be based on the work performed on the issues in which they were successful.").

From our review of the record, it appears that plaintiff may well be able to establish that he requested fees only for services that were reasonably related to the recovery of damages for injuries flowing from Busche's unlawful termination. However, because the district court awarded fees under a legal standard implicitly rejected by this court in *Muscare*, we believe it is necessary to allow the district court to reconsider its award in light of that opinion, which was published one day after the district court issued its final decision in this case.[15]

D. Costs

Fed.R.Civ.P. 52(a) provides that "costs shall be allowed as of course to the prevailing party unless the court directs otherwise." Since the district court properly determined that Busche was the prevailing party in this action, it did not err in awarding costs to Busche.

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[15] Burkee also requests that he be afforded a hearing on remand of the attorney's fees computation. In *Murphy v. Kolovitz*, slip op. at 2, this court noted that the district court may, in its discretion, request written briefing in lieu of a hearing on the determination of appropriate attorney's fees. Of course, whether or not a hearing is held, Burkee must be allowed sufficient opportunity to contest plaintiff's fee request. *Cf. Konczak v. Tyrrell*, 603 F.2d 13, 19 (7th Cir. 1979) ("Considering the depth of the briefing, a hearing on attorney's fees was unnecessary.").

IV.

For the foregoing reasons.[16] the decision of the district court is affirmed, except for the attorney's fee award, which is remanded to the district court for further proceedings consistent with this opinion. Defendant will bear the costs of this appeal.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[16] Matters not discussed in this opinion have nevertheless been duly considered. We have found them to be insufficiently important or meritorious to warrant discussion.

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ROBERT LESLIE BUSCHE,

Plaintiff,

v.

ROBERT L. BOSMAN and
WALLACE E. BURKEE,

Defendants.

DECISION AND ORDER

Civil Action
No. 76-C-559

This is an action brought pursuant to 42 U.S.C. secs. 1983 and 1985 for damages and injunctive relief arising out of the plaintiff's allegedly unlawful initial termination from employment with the Kenosha Police Department and, following his reinstatement, his subsequent sixty-day suspension without pay. Trial to the court was held on June 5, 6 and 25, 1979. On June 6, 1979, the Court granted the plaintiff's motion to dismiss the action against the defendant Joseph H. Trotta. On June 25, 1979, the action was dismissed by stipulation against the defendants, Bernice Nagy, Jack Rice, Fred Hopf,

Gregg Vigansky, Bernard Dunlap, and Jerold W. Breitenbach. Thus, there remain as defendants in the action Robert L. Bosman, formerly the Chief of Police in Kenosha, Wisconsin, and Wallace E. Burkee, formerly the Mayor of Kenosha, Wisconsin.

Plaintiff alleges that his rights to due process arising under the Fourteenth Amendment to the United States Constitution were violated by the manner of his initial termination from employment on August 12, 1974, by the conduct of the subsequent Police and Fire Commission ("Commission") investigation of the charges against the petitioner, and by selective prosecution of the petitioner for acts which had also been committed by other members of the Kenosha Police Department.

The Court held as a matter of law during the trial that plaintiff's initial termination from employment was unconstitutional. It had previously ruled in a decision and order issued September 15, 1978, that any collateral consequences which plaintiff suffered as a result of the unlawful termination and which were not

cured by his subsequent reinstatement with back pay were compensable. With regard to the conduct of the Police and Fire Commission hearing, however, the Court finds that no compensable due process violations occurred. Plaintiff has challenged the adequacy of the notice provided to him prior to the hearing, the jurisdiction of the Commission to hear the charges, the failure of the Commission to set forth explicitly the standard proof which it was applying to the case, and the adequacy of the written findings issued by the Commission.

The Court finds that the notice was indeed insufficient. It provided plaintiff with a statement of the nature of the violation with which he was charged and the approximate date of commission of the violation, but failed to provide him with a statement of the evidence which would be presented with respect to the charges. See Exhibit 23; Dahlinger v. Town Board of the Town of Delavan, 389 F.Supp. 977 (E.D. Wis. 1974); Weyenberg v. Town of Menasha, 401 F.Supp. 801 (E.D. Wis. 1975). The Court concludes, however, that plaintiff waived his

right to object to the sufficiency of the notice. Shortly after the commencement of the Police and Fire Commission hearing, he was offered an adjournment for the purpose of receiving an elaboration of the charges and declined the offer. Plaintiff also stipulated in court on June 5, 1979, that he had sufficient time to prepare for the hearing, and he testified that he was able to present to the Commission all of the evidence which he wished presented.

As for plaintiff's objection to the jurisdiction of the Commission to hear the charges, the Court is of the opinion that any objections which the plaintiff had to the composition or jurisdiction of the Commission should have been raised on appeal in state court and are not, at least under the circumstances of this case, a matter of constitutional dimension. This Court is concerned only with possible violations of the Fourteenth Amendment to the United States Constitution and not with possible violations of sec. 62.13(5), Wis. Stats. Plaintiff's objection to the failure of the Commission to specify the standard of proof which it was

applying is also without merit, since the plaintiff admitted the charges and thus they were proven both by a preponderance of the evidence and beyond a reasonable doubt. Finally, as to the Commission's findings, the Court finds that while they could have been more specific, they were minimally sufficient.

With regard to plaintiff's claim of selective prosecution, the Court has no doubt that the impetus for plaintiff's termination from employment and for the Police and Fire Commission hearing was the federal indictment which named plaintiff as an unindicted co-conspirator. The Court also recognizes that plaintiff was never charged with or convicted of a criminal offense. The fact remains, however, that plaintiff had committed the acts for which he was disciplined by the Commission, as had officer Fredericksen who was also disciplined, and that while there was evidence of other officers having improperly filled out 2101 vehicle registration forms, there was no evidence that other officers had filled out such forms in blank. Consequently, the Court believes

that there was a legitimate basis for the charges against the plaintiff, that the Commission's findings were not arbitrary and capricious, and that no violation of the equal protection clause of the Fourteenth Amendment occurred.

Finally, before making its formal findings of fact and conclusions of law, the Court will consider whether the circumstances of plaintiff's initial termination from employment warrant an award of punitive damages. In Stolberg v. Members of the Board of Trustees for the State Colleges of the State of Connecticut, 474 F.2d 485 (7th Cir. 1973), the Court noted that punitive damages may be awarded in an appropriate case under 42 U.S.C. sec. 1983 even in the absence of an award of compensatory damages. The Court declined to decide, however, whether the standard should be that "'a defendant has acted wilfully and in gross disregard for the rights of the complaining party,'" or whether it should be extended to instances "where the defendant acted with knowledge that he was violating the plaintiff's rights or with reckless disregard of whether he was violation such rights." 474

F.2d, at 489. See also, e.g., Sexton v. Gibbs, 327 F.Supp., 134, 142-143 (N.D. Tex. 1970), aff'd 446 F.2d 904 (5th Cir. 1971); Lee v. Southern Home Sites Corporation, 474 F.2d 485, 489 (2d Cir. 1973); Morales v. Haines, 486 F.2d 880, 882 (7th Cir. 1973).

Even under the stricter standard, the Court finds that punitive damages in this case are appropriate against the defendant Burkee. As set forth in the findings of fact, the defendant Burkee was advised prior to ordering the termination of the plaintiff that he lacked authority to terminate and could merely suspend; he was specifically informed of plaintiff's rights under sec. 62.13(5), Wis. Stats., to due process prior to a termination from employment, which rights are consistent with plaintiff's rights under the Fourteenth Amendment, Dahlinger v. Town Board of the Town of Delavan, supra; Weyenberg v. Town of Menasha, supra; and yet knowing the rights to which plaintiff was entitled, the defendant Burkee committed a willful violation of those rights by ordering plaintiff's termination without a prior hearing.

With regard to the defendant Bosman, however, who is the only other defendant remaining in this action, the Court finds that in the matter of the plaintiff's termination, he acted only as an agent of the Mayor and, therefore, is entitled to dismissal with prejudice of the action against him.

Upon the record, proceedings, testimony, exhibits, stipulations, and evidence in this action, therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The plaintiff Robert L. Busche is an adult resident of the State of Wisconsin and the City and County of Kenosha.

2. The defendant Robert L. Bosman was at all times pertinent the Chief of Police for the City of Kenosha, Wisconsin, and acted in that capacity under color of state law and the ordinances and regulations in effect in the City of Kenosha and State of Wisconsin. He was on the Kenosha Police Department from September 16, 1948 to January 31, 1977, and was Chief of Police from February 1, 1968 until January 31,

1977, and more specifically, he was the duly appointed Chief of Police in August 1974.

3. The defendant Wallace E. Burkee was the duly elected Mayor of the City of Kenosha from April 1967 to April 1976, and more specifically during the month of August 1974, and acted in that capacity under color of state law and the ordinances and regulations in effect in the City of Kenosha and State of Wisconsin.

4. On May 1, 1969, Robert L. Busche was appointed to the position of patrolman in the Police Department of the City of Kenosha, Wisconsin.

5. From May 1, 1969 until August 6, 1974, Robert L. Busche was rated by his superiors as an average to above average police officer based upon the following range of rating classifications: unsatisfactory, barely acceptable, below average, average, above average, and outstanding. During this period of time, Robert L. Busche had no formal reprimands or disciplinary actions recorded in his personnel file against him. He was at all times a hard-working and conscientious officer, and prior

to August 6, 1974, received several commendations.

6. In May of 1974, the Chief of Police, Robert L. Bosman, was informed by a member of the Federal Bureau of Investigation ("FBI") that officers Busche and Fredericksen, two Kenosha police officers, were cooperating in a federal investigation involving a multi-state stolen car ring.

7. In May of 1974, the Kenosha Police Department conducted an investigation in conjunction with the FBI, involving the activities of White Auto Sales, Robert L. Busche, and Thomas A. Fredericksen.

8. White's Auto Sales was located, at all times relevant, in Kenosha County, outside the limits of the City of Kenosha, Wisconsin.

9. Between the dates of May 1974 and August 6, 1974, defendant Robert L. Bosman learned that officers Busche and Fredericksen were alleged to have signed 2101 forms without inspecting the motor vehicle identification numbers for Leslie White, a car dealer in Kenosha, Wisconsin.

10. Between the dates of May 1974 and August 12, 1974, defendant Robert L. Bosman took notes during the conferences with members of the Federal Bureau of Investigation and was informed of the details concerning the vehicles involved, the dates the 2101 forms were signed by Busche and Fredericksen, and the nature of the conduct that Busche and Fredericksen were engaged in with one Leslie White.

11. Said FBI investigation resulted in a Federal grand jury indictment of Leslie Eugene White, a/k/a Tiny White, in the United States District Court for the Eastern District of Wisconsin on August 5, 1974.

12. Said grand jury indictment stated in paragraph 3-D, page 5, as follows:

> "D. As a further part of the scheme to defraud, defendant LESLIE EUGENE WHITE, a/k/a TINY WHITE, obtained the services of THOMAS A FREDERICKSEN and ROBERT LESLIE BUSCHE, officers of the Kenosha, Wisconsin, Police Department, not named as defendants herein, to sign applications for registration an certificate of title forms of the Division of Motor Vehicles, Department of Transportation of the State of Wisconsin. The defendant, LESLIE EUGENE WHITE, a/k/a TINY WHITE, offered and gave money to said Thomas A. Fredericksen and offered money to said Robert Leslie Busche."

Robert L. Busche and Thomas A. Fredericksen were

unindicted co-conspirators as a result of the Federal grand jury indictment.

13. No disciplinary action was taken against the plaintiff Robert L. Busche for the signing of 2101 forms without inspecting the vehicle identification numbers between May 1974 and August 6, 1974.

14. On August 6, 1974, an article appeared in the Milwaukee Sentinel that police officers Busche and Fredericksen were named an unindicted co-conspirators in an eleven-count indictment against Leslie White and others.

15. Between the dates of May 1, 1969 and August 6, 1974, the plaintiff was a Kenosha police officer, was considered by defendant Bosman as an exceptional officer, and had a good reputation as a police officer in the community of Kenosha, Wisconsin, and among his fellow police officers.

16. Prior to August 6, 1974, the plaintiff had obtained an Associate Degree in Law Enforcement from Gateway Technical Institute, and had obtained a Bachelor of Arts Degree, with a major in Law Enforcement, from the College of

Racine.

17. On August 6, 1974, Mayor Burkee read about the beforementioned indictment and called Chief Bosman to inquire thereof. Chief Bosman advised Mayor Burkee that he knew of the events referred to in said indictment as the Police Department had been investigating said subject matter since May of 1974 in conjunction with the FBI.

18. During the period of August 6 through August 12, 1974, the Chief of Police had in his possession four written investigative reports concerning this matter before the Federal grand jury and had an oral report from the FBI relative to the FBI's investigation, which oral reports included the statement that Robert L. Busche admitted to the FBI the signing of MVD 2101 Forms in blank.

19. During the period of August 6, 1974 through August 12, 1974, and prior to the termination of Robert L. Busche, Police Chief Bosman informed Mayor Burkee of the contents of said investigation and also of the fact that Robert L. Busche refused to give a recorded statement

to the Police Department on the advice of his attorney.

20. On August 6, 1974, Chief Bosman, after consultation with his staff, suspended Robert L. Busche with pay pending a complete investigation into the before-stated matter. This was done on the initiative of Chief Bosman and not upon the request of Mayor Burkee. Mayor Burkee did not know of said suspension until after it had occurred, and Mayor Burkee did not object to the suspension upon finding out about it.

21. Prior to August 6, 1974, the Chief of Police Robert L. Bosman knew that the standard procedure to suspend or terminate a police officer was to suspend an officer, for cause, pending a complete investigation and possible filing of charges before the Kenosha Police and Fire Commission.

22. When Robert L. Bosman suspended Robert L. Busche on August 6, 1974, pending a complete investigation pursuant to sec. 62.13 of the Wisconsin Statutes, he was treating the plaintiff in the usual manner for a police officer who

might ultimately be suspended or terminated.

23. Between the dates of August 6, 1974 and August 9, 1974, a meeting was held at the Police Department with defendants Bosman and Burkee and with Inspector of Police Joseph Trotta and City Administrator John Serpe. At the meeting, Mayor Wallace E. Burkee issued a verbal order to Robert L. Bosman to terminate Robert L. Busche from the Kenosha Police Department. Bosman informed Mayor Burkee that according to sec. 62.13 of the Wisconsin Statutes, the plaintiff could not be terminated without a hearing before the Police and Fire Commission. Bosman further stated that he had not completed the investigation concerning the plaintiff's conduct. With full knowledge of the plaintiff's right to a pre-termination hearing, Mayor Burkee ordered the plaintiff terminated without a hearing and stated, "Do you want a couple of crooks on the Police Department?".

24. Defendant Robert L. Bosman knew that he was in charge of the Police Department under the direction of the Mayor, and he had the obligation to obey any lawful order of the Mayor

through his knowledge of the Wisconsin Statutes.

25. Defendant Robert L. Bosman knew that defendant Wallace E. Burkee's verbal order to terminate the plaintiff was unlawful but felt compelled to obey the order because of certain rules and regulations in effect at the Kenosha Police Department.

26. On August 9, 1974, a meeting was held in the District Attorney's office. The Mayor, Police Chief, District Attorney Bruce Schroeder, City Administrator John Serpe, a representative of the United States Justice Department, Inspector of Police Joseph Trotta, Robert L. Busche and his attorney, Donald E. Mayew, and Thomas A. Fredericksen and his attorney, David L. Phillips, and other police personnel attended. This meeting was basically informational and to determine whether or not the District Attorney would prosecute officers Busche and Fredericksen, and to discuss the alleged criminal involvement of the plaintiff in signing 2101 forms.

27. The District Attorney Bruce E. Schroeder stated that he did not have enough evidence to prosecute the plaintiff criminally but wanted

more of an investigation completed before he made a decision as to whether or not he would prosecute.

28. Robert L. Busche was never prosecuted by the District Attorney or the U.S. Attorney as a result of the investigation of the matter herein referred to.

29. During the meeting at the District Attorney's Office on August 9, 1974, the Mayor appeared to be upset and informed Bosman again to terminate the plaintiff and stated in reference to officers Busche and Fredericksen, "These men will never be police officers in this city again".

30. Joseph H. Trotta advised Mayor Burkee at the meeting held at the District Attorney's office on August 9, 1974, that it would be unfair and unjust to terminate the plaintiff and officer Fredericksen without a hearing.

31. As a result of the meeting at the District Attorney's office on August 9, 1974, and at the direction of the defendant Burkee, officers Busche and Fredericksen were given until Monday, August 12, 1974, to resign or

they would be terminated and charges filed with the Kenosha Police and Fire Commission.

32. Robert L. Busche did not resign within said three day period of time.

33. On August 12, 1974, Chief Bosman was of the opinion that State law required a hearing before the Police and Fire Commission prior to an officer being removed from the police force. Chief Bosman felt that the final decision on hiring and firing always rested with the Police and Fire Commission.

34. On August 12, 1974, Chief Bosman terminated the employment of Robert L. Busche by means of a written directive, said termination being without a pre-termination hearing before the Police and Fire Commission.

35. Chief Bosman would not have terminated Robert L. Busche without a pre-termination hearing had it not been for the direct oral order of the Mayor.

36. Chief Bosman did not ask the Mayor for a written order relative to the termination of Busche because he was of the opinion that State law required him to obey both the oral

and written orders of the Mayor.

37. Chief Bosman did not ask the Police and Fire Commission or the City Attorney to override the Mayor's order.

38. Chief Bosman was of the opinion that he was a police officer as well as a Police Chief in August of 1974, and that he was bound by the rules and regulations of the Kenosha Police Department, and he was of the opinion that Rule 7, then in effect, spelled out a procedure to use under such circumstances, namely, to bring the unlawful order to the attention of the Mayor as head of the Police Department and then to obey said order.

39. Defendant Robert L. Bosman knew that the plaintiff was married and had children, knew that the termination would place the plaintiff in financial difficulty, and knew specifically that the plaintiff would not receive pay or benefits from the City of Kenosha.

40. Defendant Robert L. Bosman knew the termination would create additional publicity in the Kenosha News and the local radio media that would harmfully affect the reputation of

the plaintiff and the other police officer.

41. Defendant Wallace E. Burkee knew that the termination of the plaintiff would be without pay or benefits, knew that the termination would create additional publicity in the Kenosha News and local radio media that would harmfully affect the reputation of the plaintiff and the other police officer, and would create the impression that the plaintiff and the other officer were guilty of criminal acts.

42. On August 12, 1974, Mayor Burkee did not personally know Robert L. Busche and did not have any personal animosity or hatred towards him.

43. When Chief Bosman and Mayor Burkee discussed the case of Robert L. Busche in August 1974, his case was always discussed in conjunction with officer Fredericksen. On August 6, 1974, Fredericksen was also suspended by Chief Bosman pending a complete investigation. On August 9, 1974, officer Fredericksen's case was also discussed in the District Attorney's office, and he was also given three days to resign, which he did not do. On August 12, 1974,

officer Fredericksen was terminated by Chief Bosman under the order of Mayor Burkee.

44. A substantial amount of local radio and newspaper media coverage resulted from the August 6, 1974, suspensions of officers Busche and Fredericksen, and from the August 12, 1974, terminations of officers Busche and Fredericksen.

45. Whereas the publicity surrounding the August 6, 1974, suspension of the plaintiff created the impression in the minds of the public that plaintiff had been accused of committing a criminal act, the termination created the impression that he had been found guilty of committing a criminal act, and thuse the publicity after August 12, 1974, was significantly more harmful to plaintiff's reputation than the publicity between August 6, 1974 and August 12, 1974.

46. At the time the plaintiff was terminated on August 12, 1974, he was given written notice of the charges of Robert L. Bosman.

47. The written charges were filed with the Kenosha Police and Fire Commission and asked

the Commission to "uphold the discharge of ROBERT L. BUSCHE pursuant to Section 62.13 of the Wisconsin Statutes".

48. The charges of Robert L. Bosman, Chief of the Police Department, did not disclose to the plaintiff the source, or sources, of information upon which the charges were based.

49. On August 15, 1974, Robert L. Busche, through his attorney, Donald E. Mayew, made a written demand for a hearing before the Board of the Police and Fire Commission in connection with the charges filed against him by Robert L. Bosman, Chief of Police.

50. On August 26, 1974, Jack Rice, President of the Police and Fire Commission, City of Kenosha, Wisconsin, caused a notice of hearing to be served on the plaintiff and his attorney, Donald E. Mayew, such notice announcing, among other things, that there would be "a hearing on the charges of ROBERT L. BOSMAN, Chief of the Department of Police of the City of Kenosha, Wisconsin, as placed against you on the 12th day of August, 1974 ..."pursuant to sec. 62.13 (5)(d) of the Wisconsin Statutes.

51. Between the dates of August 12, 1974 and September 11, 1974, Robert L. Busche did not receive a salary or other benefits from the Kenosha Police Department.

52. The Police and Fire Commission heard the cases jointly against Busche and Fredericksen on September 11, 17 and 19, 1974.

53. On September 11, 1974, as its first order of business, the Police and Fire Commission, upon the request of their attorneys, reinstated officers Busche and Fredericksen as police officers with back pay on the ground that a procedural error which resulted in a denial of due process occurred in that said officers were not continued on a suspension with pay status during the entire period from August 12, 1974, until the Police and Fire Commission could render a decision on the merits of their case.

54. On September 11, 1974, the plaintiff's attorney, Donald E. Mayew, also moved the Police and Fire Commission to dismiss the action because the Kenosha Police and Fire Commission did not have jurisdiction over the plaintiff

because of the illegal firing of August 12, 1974, and because the notice of the charges was inadequate. The Commission denied the motion to dismiss for lack of jurisdiction. District Attorney Breitenbach did, however, offer to provide plaintiff with an elaboration of the charges against him. Plaintiff, by his attorney, decline the offer.

55. At the hearing, the members of the Kenosha Police and Fire Commission were informed that the Chief of Police had the burden of proving the charges, but no one, including the Assistant City Attorney, informed them of the standard of proof necessary to sustain a conviction of the charges.

56. In the course of the Police and Fire Commission hearing, Kenosha police officers Haen, Aull, Wilkinson, Hansler, and Christensen admitted that they had filled out 2101 forms without inspecting the motor vehicle indentification number, instead getting the number from the certificate of title. They did not admit to having signed any 2101 forms in blank.

57. The plaintiff admitted during the

course of the hearing that he had on a few occasions signed 2101 forms in blank.

58. On September 22, 1974, the Police and Fire Commission suspended Robert L. Busche for a period of sixty days without pay or benefits upon consideration of the following charges made against Busche by Robert L. Bosman, Chief of Police:

> "That ROBERT BUSCHE did, in his capacity as a Police Officer, make entries on a certificate, to-wit, Form 2101, entitled "Vehicle Registration and Certificate of Title Application', from the Department of Motor Vehicles, Division of Transportation of the State of Wisconsin, which, in a material sense, he intentionally falsified and he knowingly made false statements on said application for certificate of title in that in May of 1973 the said ROBERT BUSCHE did sign for White Auto Sales located in Kenosha County, a number of the said 2101 forms wherein he certified that he had inspected serial numbers of motor vehicles when, in fact, he had signed and certified said 2101 forms in blank without making an inspection of any motor vehicle; that said acts by the said ROBERT BUSCHE were in violation of Section 342.06(2) and 946.12 (4) of the Wisconsin Statutes and Rules numbered three (3), sixteen (16) and twenty-seven (27) of the General Rules and Regulations of the Kenosha Police Department, Revised January 30, 1967, Kenosha, Wisconsin."

The Police and Fire Commission made the following findings and determinations in assess-

ing said sixty-day suspension:

"THE COMMISSION FINDS:

"Based upon the testimony and exhibits having been presented before the Commission that Officer Robert Busche, during the period May, 1973 through July, 1973, did intentionally sign, for White's Auto Sales, located in Kenosha County, and Leslie Eugene White, approximately five (5) Form 2101, of the Division of Motor Vehicles, Department of Transportation, State of Wisconsin, entitled 'Vehicle Registration and Certificate of Title Application' in blank, without making any inspection of any motor vehicle, and thereby made knowingly false statements on said applications for certificate of title.

"THE COMMISSION DETERMINES:

"That such conduct on the part of Officer Robert Busche violated Rules numbered three (3) and sixteen (16) of the General Rules and Regulations of the Kenosha Police Department, revised January 30, 1967, Kenosha, Wisconsin, and is an apparent violation of Sections 342.06(2) and 946.12 (4) of the Wisconsin Statutes."

59. The above references to suspension, termination, and disciplinary action are, at present, contained in Busche's personnel file.

60. Busche did not appeal the reasonableness of the action of the Police and Fire Commission to the Circuit Court as provided by State law, did not challenge the nature of the proceedings through certiorari or other means of review, and has commenced no other action

to challenge the September 22, 1974, action of the Police and Fire Commission other than in this action.

61. Robert L. Busche, during said sixty-day suspension, suffered an out-of-pocket wage loss of $1,286.36, which figure includes straight pay and averaged overtime.

62. Between the dates of August 13, 1974 and September 12, 1974, the Kenosha News carried the story about the termination of the plaintiff and the other police officer as a prominent local story, and the plaintiff was referred to in such articles as fired or terminated officer.

63. Between the dates of September 6, 1974 and October 1974, there was a great deal of publicity in the Kenosha News and radio media relating to the suspension, firing, reinstatement, and the eventual suspension of the plaintiff.

64. Mayor Burkee and Chief Bosman did not actively seek publicity from the radio and news media in August and September of 1974 relative to the Busche and Fredericksen matters.

65. Prior to August 12, 1974, there were no written directives of the Kenosha Police Department explaining how to fill out 2101 forms.

66. A 2101 form is an official State of Wisconsin motor vehicle from entitled "Application for Registration and Certificate of Title". Said form states that "This form is to be used for an automobile-motorcycle-power cycle or mobile home that is new or was last registered in another State or Country." The back of said form has a box entitled "Law Enforcement Officer's Certificate of Inspection" with the following instructions within said box: "Identification or Engine and Serial numbers must be taken directly from vehicle. This is to certify that I have personally checked the vehicle described on the reverse side of this application and found the numbers to be:".

67. Prior to August 12, 1974, police officers did not receive any formal training on how to fill out 2101 forms.

68. On October 29, 1974, Chief Bosman issued a memorandum to all department personnel explaining the procedure to be used in filling

out 2101 forms, and said memorandum specifically stated, "* * * the officer will check the vehicle and take the identification number, the serial number, or the motor number, whichever applies, directly from the vehicle being checked".

69. On July 2, 1975, Robert L. Busche advised Police Chief Robert L. Bosman, by written communication, that he was interested in the positions of sergeant and juvenile investigator, which positions were posted on June 30, 1075. The positions applied for by Robert L. Busche were filled on August 1, 1975, and Robert L. Busche was not appointed.

70. Chief Bosman filled said positions with personnel having more seniority then Busche, as he considered seniority in promotions very important. Chief Bosman would not have appointed Busche to any of said openings filled on August 1, 1975, as he felt the other appointed applicants were more qualified, and this would have occurred whether or not Busche was charged and disciplined as heretobefore indicated, although the disciplinary proceed-

ing was one of the factors considered.

71. On September 1, 1978, Busche was promoted to the position of sergeant in the Kenosha Police Department by unanimous vote of the Police and Fire Commission.

72. Following his suspension from employment on August 6, 1974, plaintiff was not unduly upset or depressed because he believed that the suspension was temporary and natural in view of the federal indictment and that he would soon be reinstated. Following his termination on August 12, 1974, however, plaintiff became severely depressed, changed his drinking habits and began to drink heavily, became moody and quarrelsome, had marital difficulties which eventually ended in divorce, and had financial difficulties due to his loss of income. In part because of his financial difficulties and in part because of a reluctance to discuss his problems, plaintiff did not seek psychiatric or medical attention.

73. Following his sixty-day suspension on September 22, 1974, and continuing even after he recommenced working on October 21, 1974,

plaintiff was depressed and bitter about the termination and suspensions. His physical and alcoholic problems cleared up shortly after he recommenced work, and he performed his work at all times in an able and conscientious manner, but his attitude did not revert to normal for approximately one year after he recommenced working.

74. The publicity surrounding plaintiff's suspension on August 6, 1974, and particularly that resulting from his termination on August 12, 1974, created the impression in the minds of the public that plaintiff was guilty of criminal involvement in a stolen car ring. There was substantial publicity and public discussion about plaintiff's situation from August 1974 through the end of the year. Thereafter to the present, there has been intermittent discussion of the incident in the Kenosha area, and plaintiff is still occasionally the subject of negative comment by members of the public and by fellow workers.

CONCLUSIONS OF LAW

1. This action was brought pursuant to

42 U.S.C. sec. 1983, and the court has jurisdiction under 28 U.S.C. secs. 1343 and 1331.

2. On motion of the plaintiff, the action was dismissed against former defendant Joseph H. Trotta on June 6, 1979.

3. By stipulation of the parties, the action was dismissed against former defendants Bernice Nagy, Jack Rice, Fred Hopf, Gregg Vigansky, Bernard Dunlap, and Jerold W. Breitenbach on June 25, 1979.

4. The defendants Robert L. Bosman and Wallace E. Burkee were acting at all times relevant under color of state law.

5. Section 62.13(5), Wisconsin Statutes, and particularly subsection (h) thereof, gave plaintiff a proprietary interest in his position as a tenured police officer for the City of Kenosha, Wisconsin.

6. The August 12, 1974, termination of plaintiff was in violation of the due process clause of the Fourteenth Amendment to the United States Constitution in that it was accomplished without a pre-termination hearing and constitutes a violation of 42 U.S.C. sec. 1983.

7. The defendant Burkee committed a willful and knowing termination without a prior hearing because the defendant Burkee was previously advised of plaintiff's rights and ordered the termination despite his full awareness of those rights.

8. The defendant Bosman acted merely as an agent of the defendant Burkee in terminating the plaintiff from employment on August 12, 1974, and is therefore not liable for a violation of plaintiff's constitutional rights.

9. The constitutional and civil rights of the plaintiff were not violated as a result of the hearing held by the Police and Fire Commission on and after September 11, 1974, in that:

(a) While the charges were vague in that they failed to specify the factual basis for the charges, plaintiff waived his right to object to the sufficiency of the charges when he was offered and declined the opportunity for a further elaboration of the charges. Busche was also not prejudiced as a result of said

charges because he had sufficient time to prepare and was able to present all of the evidence which he wished presented.

(b) The fact that the Police and Fire Commission did not specify what standard it would use to weigh the evidence, such as "beyond a reasonable doubt," "preponderance of the evidence," etc., is not material. In the absence of a stated standard, a preponderance of the evidence standard is presumed to have been used and such standard is adequate in disciplinary cases. Also, plaintiff admitted the charges, and therefore the charges were proved by the highest possible standard, "beyond a reasonable doubt."

10. The plaintiff was not selectively prosecuted in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

11. The hearing held before the Kenosha Police and Fire Commission on September 11, 17, and 19, 1974, after the unconstitutional termination of August 12, 1974, denied the

plaintiff a meaningful opportunity to be heard, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution, because the harm that a pre-termination hearing was designed to prevent had already taken place on August 12, 1974, when the plaintiff was terminated without a hearing. The purpose of a pre-termination hearing is to protect a government employee's reputational interest and to protect an employee's reasonable expectation of continue employment, both protected by the due process clause of the Fourteenth Amendment to the United States Constitution. A hearing after an unconstitutional termination is not a substitute for a hearing prior to termination as required by law, because by the time the plaintiff had an opportunity to be heard, his reputation was adversely affected, he had not been receiving wages, and his status as a police officer had been terminated; therefore, plaintiff is entitled to compensatory damages resulting from the August 12, 1974, termination.

12. Pursuant to 42 U.S.C. sec. 1988, the plaintiff is entitled to recover his reasonable

attorney's fees.

ORDER

For the foregoing reasons,

IT IS ORDERED that his action is dismissed with prejudice against the defendant Robert L. Bosman.

IT IS FURTHER ORDERED that the plaintiff Robert Leslie Busche recover from the defendant Wallace E. Burkee the following sums:

(a) As compensatory damages for the harm to plaintiff's reputation and for his pain and suffering, the sum of $10,000.

(b) As punitive damages for the defendant Burkee's willful and intentional violation of plaintiff's constitutional rights, the sum of $2,000.

IT IS FURTHER ORDERED that the record of plaintiff's termination on August 12, 1974, be expunged from the records of the Kenosha Police Department.

IT IS FURTHER ORDERED that the defendant Burkee shall pay to the plaintiff his reasonable attorney's fees as part of the costs of this action, and if the parties cannot agree on a

sum, then the plaintiff may, within twenty days from the filing date of this decision and order, serve and file a motion with supporting affidavits for the recovery of his attorney's fees.

Dated at Milwaukee, Wisconsin, this 15th day of August, 1979.

/s/ John W. Reynolds

John W. Reynolds, Chief Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ROBERT LESLIE BUSCHE,
Plaintiff,

v.

WALLACE E. BURKEE,
Defendant.

DECISION AND ORDER

Civil Action
No. 76-C-559

On August 15, 1979, the Court issued a decision and order in the above-entitled action awarding to the plaintiff Robert Leslie Busche $10,000 as compensatory damages and $2,000 as punitive damages against the defendant Wallace E. Burkee. The other defendants were dismissed at that time or had previously been dismissed.

The defendant Burkee has now filed a motion for a rehearing on the amount of damages and for a breakdown of damages awarded as to mental distress and damage to reputation, and as to damages sustained prior to and after the Police and Fire Commission hearing. The

plaintiff has filed a motion for attorney's fees for 183.5 hours of work at a rate of $50 per hour, or a total of $9,175. Defendant requests a hearing on the motion for fees. He does not challenge the number of hours spent or the hourly rate requested, but argues for an apportionment of fees between the time spent by plaintiff's attorneys on issues as to which the plaintiff was ultimately successful and time spent by them on issues as to which plaintiff was not ultimately successful.

The defendant Burkee's motion for a rehearing and breakdown of damages will be denied. At the time that it made its findings on damages, the Court took into consideration all of the mitigating factors which the defendant wishes to raise at a rehearing on damages, which factors are set forth in defendant's brief (at pages 1-2) filed September 10, 1979, in support of his motion, and no purpose would be served by a reargument. As for the breakdown of damages requested, the Court took into consideration in making its award that not all of plaintiff's injuries were caused by the conduct of the

defendant Burkee, and the damages assessed against Burkee were only those which the Court found to be attributable to his illegal conduct, i.e., to his initial termination of the plaintiff from employment.

The plaintiff's motion for attorney's fees will be granted. In Schmidt v. Schubert, 433 F.Supp. 115, 118 (E.D. Wis. 1977), this Court in discussing the amount of fees appropriately awarded under 42 U.S.C. sec. 1988 in an action brought pursuant to 42 U.S.C. sec. 1983, stated:

> "***Thus, the magnitude and complexity of the case, along with the quality of services of counsel, the time and labor spent in connection with the case, and the beneficial result achieved as a result of counsel's representation are all factors to be considered by this Court in deciding the plaintiff's motion. [Citation omitted.]"

This was a complex case in that it involved numerous different issues arising under the due process clause of the Fourteenth Amendment and required plaintiff's counsel to prepare for and present evidence on all of those issues and to respond to a substantive motion

brought by the defendants. The defendant Burkee does not question the quality of counsel nor the time and labor spent in connection with the case, and the Court as well is satisfied that the quality of counsel was high and that the hours claimed were in fact expended in preparation of the case.

Defendant's primary objection to the fee award is that the plaintiff did not prevail on all of the issues raised in his complaint and did not get judgment against all of the originally named defendants. The Court is satisfied, however, that all of the issues raised in the complaint were raised in good faith, and that plaintiff's counsel had an obligation to their client to investigate and prepare for trial on all of said issues arising out of the single incident which formed the basis for the action. Further, as stated in Northcross v. Board of Education of Memphis, 48 U.S.L.W. 2385, 2386 (6th Cir., Nov. 23, 1979):

> "***Once the issue of whether a party is entitled to recover attorneys' fees for all time reasonably spent on a matter. The fact that some of that time was spent on issues

> that were ultimately unproductive, rejected by the court, or mooted by intervening events is wholly irrelevant. District courts are to allow compensation for hours expended or unsuccessful research or litigation unless the positions asserted are in bad faith."

IT IS THEREFORE ORDERED that plaintiff's motion for an award of attorney's fees in the amount of $9,175 is granted.

IT IS FURTHER ORDERED that the defendant Burkee's motion for a rehearing and for a breakdown of damages is denied.

Dated at Milwaukee, Wisconsin, this 12th day of February, 1980.

_____

John W. Reynolds, Chief Judge

APPENDIX E

Opinion by Judge Cudahy

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 21, 1981.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Dudley B. Bonsal, Senior District Judge*

ROBERT LESLIE BUSCHE,
Plaintiff-Appellee,
Cross-Appellant,

Nos. 80-1248
80-1345 vs.

WALLACE E. BURKEE,
Defendant-Appellant,
Cross-Appelle.

Appeals from the United States District Court for the Eastern District of Wisconsin.

No. 76-C-559
Judge John W. Reynolds

This case was head on the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby

AFFIRMED, except for the attorney's fee award, which is REMANDED with directions; defendant to bear the costs on appeal; in accordance with the opinion of this Court filed this date.

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*/ The Honorable Dudley B. Bonsal, Senior District Judge of the Southern District of New York, is sitting by designation.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ROBERT LESLIE BUSCHE,

Plaintiff,

vs.

WALLACE E. BURKEE,

Defendant.

PETITION FOR DUE PROCESS HEARING ON ATTORNEYS FEES AND COURT COSTS

File No. 76-C-559

TO: Walter W. Stern, Esq.,
Anderson & Stern,
5401 - 60th Street,
Kenosha, WI 53142.

Attorney for Plaintiff

PLEASE TAKE NOTICE that Defendant, Wallace E. Burkee, through his Attorney, James W. Conway, Kenosha City Attorney, requests that he be afforded a full due process hearing involving the taking of testimony on the record prior to the Trial Court making any determination on the award of appellate attorneys fees or court costs to Plaintiff, and prior to making any determination as to attorneys fees in the Trial Court in response to the remand from the 7th Circuit Court of Appeals.

Dated at Kenosha, Wisconsin this 19th day of June, 1981.

JAMES W. CONWAY,
Attorney for Defendant

P.O. Address:

Rm. #201-Municipal Bldg.,
625 - 52nd Street,
Kenosha, WI 53140.

Phone: (414) 656-6061.

APPENDIX G

Trial Testimony of Respondent Robert Busche on Cross-Examination: Marital Problems [Trial Transcript Vol. VI, pp. 380-384]

Q. Now you have indicated that separation papers were served upon you -- let us go into the issue of separation; I'm not sure what you testified to. Would you tell us exactly when and how the separation occurred.

A. I was served by Mr. Tully in my own residence on October 2nd. Notice that I have to leave my home, vacate it. And I believe the night before my wife had told me that the papers were coming, so it wasn't a surprise. But at the date that I was served with the papers, I was very upset with her that she did go through with it. Maybe I half heartedly believed she wasn't going through with it the day prior that she told me about it. And he instructed me as in most -- I guess in most divorce cases that I was to leave the premises and not return, and that if I had a problem, to see my own attorney.

Q. So the separation was a result of a divorce proceedings, is that correct?

A. There was no divorce proceedings as I interpret them. It was a legal separation for a given period of time. I believe by statute the term legal separation as I was served at that time was for a one year period of time or something relative to that.

Q. So this separation was something other than a divorce?

A. Yes, sir.

Q. And this separation occurred approximately ten days after the Police and Fire Commission came down with a ruling, is that correct?

A. Yes, sir.

Q. As a result of that separation, did your wife apply for and receive welfare benefits?

A. Yes, sir. I believe she did.

Q. Was there any agreement between you and your wife to commence the separation proceedings so that you wife could go on welfare?

A. No sir, there was not.

Q. On October 2nd, did you move out of the house?

A. I was ordered to leave the house on that date, yes.

Q. Did you move out of the house?

A. I don't believe I took all my belongings with me on that particular date.

Q. Is there some point where you -- well, did you leave the house physically yourself at that time?

A. Yes, sir.

Q. And how long were you continuously separated from your wife from October 2nd, 1974 onward?

A. I believe I went back to her for a two week period after I went back to work on the 21st of November, because I recall being in the house I think on Thanksgiving. I don't know for sure. And then after that two week period, I left the home again. And then it developed into a divorce proceeding.

Q. And when was the divorce proceeding started?

A. A short time afterwards, I believe.

Q. Who started the divorce proceeding?

A. I believe it was a matter of course. I don't recall exactly the sequence of events. The attorneys got together and saw that there was no way to bring the two parties together and then it went forward into a divorce action.

I don't recall the exact wording or how it was worded.

Q. Who originally started the divorce, did your wife sue you or did you sue her?

A. It was started by her.

Q. Now when you received those separation papers on October 2nd, was that a surprise to you?

A. As I testified earlier, she told me the night before that she was going to do it.

Q. Did she give you any reason?

A. Yes. She told me that welfare would not let her apply unless I was out of the home.

Q. After you came back on the police force and went back with your wife for about two weeks, can you explain to me why that relationship did not last beyond two weeks?

A. I think again the money problem was there. Maybe it was -- well, I'd have to say it was the fact that I lost faith in her. And I didn't really trust her as a person any more after she kind of shit-canned me. Got rid of me.

Q. Why didn't you trust her?

A. Well, the comment that I made to her after

she told me that she was going to the welfare and that she was serving these papers, I says what's the problem with both of us going on welfare, and I said there is so many different ways we could look at this, and she said I'm looking out for myself and the kids.

Q. Was there any other attempt at reconciliation other than for that two week period of time?

A. I don't think so.

Q. No other time you went back and lived with your wife?

A. No, sir.

Q. And when you ultimately went through the divorce proceedings and the court hearing, was the actual parting or divorce by mutual agreement?

A. No, sir. As a matter of fact, my wife wanted me back.

Q. During this period of divorce and separation, did your wife accuse you of associating with other women?

A. During what period, sir?

Q. Well, during the period that this divorce was going on and referring to the problems that

you had with your marriage. Did she accuse you of associating with other women?

A. I think that might have been one of her arguments, yes.

APPENDIX H

Trial Testimony of Respondent Robert Busche on Cross-Examination: Drinking Problems [Trial Transcript Vol. VI, pp. 384-385]

Q. Now you have indicated that, as a result of the termination and suspension, that this increaed your drinking habits. And you have indicated that you normally went out and had something to drink, you had two or three drinks and then you were drinking more.

Going back to the time prior to your being involved in this termination and suspension, when you had these two or three drinks, was this on a daily basis or occasional basis?

A. Probably once a week. I usually stayed home at night, watched TV or whatever.

Q. Now during what period of time from August 6th, 1974 onward would you say that your drinking habits -- when did they -- when did you start to drink more and how long did this last?

A. I'd probably say it started with the termination and as -- probably increased as I went through the suspension because I didn't have a job and maybe I was feeling sorry for myself at that time and depressed. So I would say it

probably increased then.

Q. When you were back -- came back to the police force, did yourdrinking habits become normal again?

A. I think they toned down to a moderation and returned to normal probably after I got remarried.

Appendix

2

Office - Supreme Court, U.S.
FILED
SEP 24 1981
ALEXANDER L. STEVAS,
CLERK

SUPPLEMENTAL APPENDIX

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1981.
No. 81-283

* *

WALLACE E. BURKEE,
Petitioner,

vs.

ROBERT L. BUSCHE,
Respondent.

* *

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

James W. Conway,
City Attorney,
Rm. #201,
625 - 52nd Street,
Kenosha, WI 53140,
Phone: (414) 656-6061,
Counsel for Petitioner.

Three (3) copies received by Respondent
this 24 day of September, 1981.

By: _____
Walter W. Stern, Atty. for Respondent.

TABLE OF CONTENTS

SUPPLEMENTAL APPENDIX
[Order of the United States District Court for the Eastern District of Wisconsin, entered September 14, 1981] Supp.A-1

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ROBERT LESLIE BUSCHE,

Plaintiff,

vs.

WALLACE E. BURKEE,

Defendant.

ORDER

Civil Action
No. 76-C-559

This is an action for damages brought pursuant to 42 U.S.C. sec. 1983. In a judgment entered on February 15, 1980, following a trial to the court, the plaintiff was awarded $10,000 in compensatory damages, $2,000 in punitive damages, $1,198 in costs, and $9,175 in attorney's fees. The judgment was affirmed on appeal on May 21, 1981, Busche v. Burkee, ___ F. 2d ___(7th Cir. 1981), except for the award of attorney's fees, and the action was remanded to this court for reconsideration of the amount of fees awarded in light of Muscare v. Quinn, 614 F.2d 577 (7th Cir. 1980).

Now pending before the court are (1) the

reconsideration of the attorney's fees awarded for work done at the trial court level; (2) plaintiff's request for appellate attorney's fees; (3) defendant's motion for postponement of hearings on the issue of attorney's fees and for a stay of the judgment pending his filing of a writ of certiorari in the United States Supreme Court and disposition of the writ; and (4) defendant's petition for a due process hearing on the award of attorney's fees.

The defendant's motion for a stay of proceedings will be denied. Both parties agree that the issuance of a stay is discretionary. According to the defendant the applicable standards are 'whetherthere is 'a balance of hardships in their [the applicants'] favor'; and whether four Justices of this Court [the United States Supreme Court] would likely vote to grant a writ of certiorari." New York Times Co. v. Jascalevich, 439 U.S. 1304 (1978)(Marshall, J.). I have reviewed the petition for a writ of certiorari filed by the defendant and I think it unlikely that four justices of the United States Supreme Court would vote to grant a writ of

certiorari in this case. Defendant argues that the case raises a novel issue of whether or not there is a federal common law rule of damages. The issue is not novel, see Carey v. Piphus, 435 U.S. 247, 257-259 (1978), although it is not always clear what elements of damage are recoverable in particular cases; nor does this case raise other issues in the area of civil rights litigation which are sufficiently in dispute amongst the circuits to be ripe for Supreme Court determination.

Furthermore the plaintiff has proposed that any money paid to him in satisfaction of the judgment or for costs or attorney's fees be placed in an interest-bearing trust account pending the disposition by the Supreme Court of the writ of certiorari. That procedure will be adopted, and it will eliminate the potential hardship claimed by the defendant of recovering from the plaintiff any sums which the defendant may pay out and to which the plaintiff may later be found not to be entitled.

The defendant's motion for a due process hearing, by which I understand him to mean an

evidentiary hearing, on the issue of fees will not be granted, although an oral argument will be scheduled.

The defendant states that since all evidence relevant to the issue of plaintiff's attorney's fees is in the possession of plaintiff and his attorney, in order to successfully challenge the statements made by plaintiff's attorney in his supporting affidavits the defendant must have an opportunity to examine the plaintiff, his attorney, and his attorney's staff in court regarding:

"1) Time spent on successful issues;

"2) Fees customarily charged to police clients; and

"3) Whether or not there was a contingent fee arrangement." (Defendant's brief filed July 24, 1981, at 6.)

In its decision in this case the Seventh Circuit stated:

> "Burkee does not contest the number of hours expended by Busche's attorneys or the reasonableness of the $50 hourly rate. * * *" (Slip Opinion at 18-19)

Thus the hourly rate awarded and the num-

ber of hours spent for work at the trial court level are not subject to further review. The sole issue subject to review with regard to the award of fees for work at the trial court level is whether the plaintiff in his previous request for fees had "requested fees only for services that were reasonably related to the recovery of damages for injuries flowing from Busche's unlawful termination" (slip opinion at 21), or whether he had also claimed fees for services rendered in connection with issues on which he did not prevail.

Secondly, the Seventh Circuit in its decision also noted:

> "Burkee also requests that he be afforded a hearing on remand of the attorney's fee computation. In Murphy v. Kolovitz, slip op. at 2 [No. 79-2441, Seventh Circuit, January 7, 1981], this court noted that the district court may, in its discretion, request written briefing in lieu of a hearing on the determination of appropriate attorney's fees. Of course, whether or not a hearing is held. [sic] Burkee must be allowed sufficient opportunity to contest plaintiff's fee request. Cf. Konczak v. Tyrrell, 603 F.2d 13, 19 (7th Cir. 1979) ('Considering the depth of the briefing, a hearing on attorney's fees was unnecessary.')" (Slip opinion

at 21 n. 15.)

Neither in Murphy v. Kolovitz, nor in Konczak v. Tyrrell, nor in Busche v. Burkee, nor in Muscare v. Quinn did the court of appeals explain its understanding of the content of a "hearing" on attorney's fees. In view of its statement in Konczak, reaffirmed in Busche, that in-depth briefing is an adequate substitute for a hearing, I assume that the court of appeals did not intend in remanding this action that I hold an evidentiary hearing on the issue of fees.

I have already requested and received written briefs. In his response the defendant noted certain items in the plaintiff's request which he challenges as not related to the issues on which the plaintiff prevailed at the trial court level. He has made no specific objection to any items in the affidavit supporting the request for appellate attorney's fees, but argues that he must be afforded the opportunity to question the statements in the affidavit.

There is no cause shown to date for allowing cross-examination by the defendant of the

plaintiff, staff members employed by the plaintiff's attorney, or the attorney. Plaintiff's attorney is an officer of the court and his sworn affidavits are based upon personal knowledge.

On the other hand, from the affidavits and briefs which have so far been submitted I cannot make an independent evaluation as to whether certain items are related to issues on which the plaintiff prevailed at trial. Therefore, I will require defendant's counsel to submit in writing a detailed statement of the specific items contained in plaintiff's requests for trial-level and for appellate attorney's fees to which the defendant objects and the reasons for his objections, and will require plaintiff's attorney to submit a detailed response setting forth the basis for his claim that those items and the time spent by him are related to issues on which the plaintiff prevailed. A non-evidentiary hearing will then be scheduled at which both counsel may present and supplement their arguments. I am not currently persuaded that any cross-exami-

nation of plaintiff's attorney on his affidavit should be permitted, but during the oral argument I will consider any arguments with respect to the need for testimony which defendant's counsel may choose to make and will schedule a further evidentiary hearing only if persuaded of the need for it.

For the foregoing reasons,

IT IS ORDERED that the defendant's motion to postpone further proceedings on attorney's fees and for a stay of the judgment is denied.

IT IS FURTHER ORDERED that the defendant pay all sums owing by him to the plaintiff, including sums owing on the judgment and for costs and sums which may be awarded to the plaintiff for his attorney's fees, to the clerk of this court for placement in an interest bearing account pending the disposition by the United States Supreme Court of the defendant's petition for a writ of certiorari.

IT IS FURTHER ORDERED that on or before October 19, 1981, the defendant serve and file a detailed statement of the specific items contained in plaintiff's requests for trial-

level and for appellate attorney's fees to which the defendant objects and the reasons for his objections, and that on or before November 9, 1981, the plaintiff serve and file a detailed response setting forth the basis for his claim that those items and the time spent by him are related to issues on which the plaintiff prevailed.

IT IS FURTHER ORDERED that oral argument on the motions for attorney's fees is scheduled at 10:00 A.M. on November 20, 1981, in Courtroom 425 of the Federal Building, Milwaukee, Wisconsin.

IT IS FURTHER ORDERED that defendant's motion for a due process hearing on the issue of attorney's fees is denied.

Dated at Milwaukee, Wisconsin, this 14th day of September, 1981.

UNITED STATES DISTRICT COURT

By: /s/ John W. Reynolds
John W. Reynolds
Chief Judge

Opposition

Office-Supreme Court, U.S.
FILED
SEP 10 1981
ALEXANDER L. STEVAS,
CLERK

81-283

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981.

No. 81-283

WALLACE E. BURKEE,

Petitioner,

vs

ROBERT L. BUSCHE,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

1. THE QUESTIONS PRESENTED IN PETITIONER'S REQUEST FOR CERTIORARI ARE NOT OF SUCH IMPORTANCE THAT PUBLIC INTEREST REQUIRES THE PETITION BE GRANTED 1

A.1. The Petition Should Be Denied Because Public Interest Does Not Require A Reinterpretation Of 42 U.S.C., Sec. 1988, To Require Federal Courts To Apply State Law 1

A.2. Public Interest Not Only Demands That This Court Not Lend Credence To Petitioner's Arguments By Granting Certiorari, But Also Requires A Denial Of Certiorari To Prevent The Evisceration Of The Civil Rights Act Contemplated If Petitioner's Arguments Are to Be Seriously Considered. 3

11. THE PETITIONER REQUESTS CERTIORARI CONCERNING INSIGNIFICANT MATTERS OF NO PUBLIC CONSEQUENCE. 7

A.1. The Petition Should Be Denied Because The Holding Of The 7th Circuit Court Of Appeals Is Consistent With Decisions Of This Court On The Applicability Of Sec. 1988 To Sec. 1983..... 7

A.2. The Petition Should Be Denied Because No Inconsistency Exists Between Sullivan v Little

Hunting Park, 396 U.S. 229 (1969) And Later Case Law Construing Sec. 1988's Applicability To Sec. 1983.. 9

III. THE HOLDING OF THE SEVENTH CIRCUIT COURT OF APPEALS DOES NOT VIOLATE THIS COURTS HOLDING IN CAREY V PIPHUS, 435 U.S. 247 (1978), IN REGARD TO PROXIMATE CAUSE OR UNJUST ENRICHMENT, AND THEREFORE THE PETITION FOR CERTIORARI SHOULD BE DENIED..... 12

A.1. Certiorari Should Be Denied Because The Question On Proximate Cause Presented By Petitioner Does Not Violate This Courts Holding In Carey v Piphus, 435 U.S. 247, And Is Not Of Such Far Reaching Dimensions To Require Consideration By This Court..... 12

A.2. The Petition For Certiorari Should Be Denied Because Respondent's Subsequent Reinstatement And Suspension Did Not Justify His Illegal Discharge Nor Would He Be Unjustly Enriched By Compensation For Injuries Sustained As A Result Of The Illegal Discharge.... 16,17

IV. THE REQUEST FOR A MANDATORY DUE PROCESS HEARING ON THE AMOUNT OF ATTORNEY'S FEES SHOULD NOT BE CONSIDERED AT ALL IN THIS REQUEST FOR CERTIORARI BECAUSE THE ISSUE IS NOT RIPE FOR CONSIDERATION..... 18

CONCLUSION 20

TABLE OF CASES

Basista v Weir, 340 F. 2d 74, (1965) 5

Bell v Hood, 327 U.S. 678 90 L. Ed 939, 66 S. Ct. 773 (1945) 10

Board of Regents v Tomanio, U.S. 64 L. Ed 2d 440, 100 d. ct. (1980) 7

Busche v Burkee, slip op. May 21, 1981, at 15 & 21 15,19

Carey v Piphus, 435 U.S. 247, (1978) 11,12,13,15, 16, 17, 18

Edmonds v Dillin, (1980, ND Ohio), 485 F. Supp. 722 4

Erie Ry. Co. v Tompkins, 304 U.S. 64 (1938) 1

Muscare v Quinn, 614 F 2d 577 (7th Cir. 1980) 19

Robertson v Wegman, 436 U.S. 584 (1978) 7

Sullivan v Little Hunting Park, 396 U.S. 229, 24 L. Ed 2d 386, 90 S. Ct. 400 (1969) 6,9,10,11

STATUTORY AUTHORITY CITED

42 U.S.C. Sec. 1983 ..... 3,6,7,8,9, 11, 12

42 U.S.X. Sec. 1988 ..... 1,2,6,7,9, 10,11,12

Federal Rule of Civil Procedure 7

Civil Rights Act 11

REFERENCE TO PETITIONER'S APPENDIX

APPENDIX C (Decision & Order, August 15, 1979, Petitioner's Petition) 14

APPENDIX D (Decision & Order, February 12, 1980, Petitioner's Petition)..... 14, 19

1. THE QUESTIONS PRESENTED IN PETITIONER'S REQUEST FOR CERTIORARI ARE NOT OF SUCH IMPORTANCE THAT PUBLIC INTEREST REQUIRES THE PETITION BE GRANTED.

A.1. The Petition Should Be Denied Because Public Interest Does Not Require A Reinterpretation Of 42 U.S.C., Sec. 1988, To Require Federal Courts To Apply State Law.

42 U.S.C. Sec. 1988 first and foremost authorizes federal courts to vindicate violations of civil rights in civil suits in accordance with the laws of the United States. "Law" is not restricted to statutes alone, but embraces all pertinent case law as well. Erie Ry. Co. v Tompkins, 304 U.S. 64 (1938). The first mandate of 42 U.S.C. Sec. 1988 is therefore that federal courts are authorized to utilize federal law (both statutory and case law) to vindicate civil rights violations. The second mandate of 42 U.S.C. Sec. 1988 authorizes federal courts to resort to state law, when the federal laws are "not adapted to the object or are deficient." A reasonable reading of this statute indicates that use of state

law is not mandatory, but is available as a resource to federal judges. in federal courts, deciding federal claims. The obvious intent of the statute, when read in conjunction with the Civil Rights Acts, is to afford federal judges a broad latitutde to fashion remedies from many sources, in order to ensure civil rights violations are appropriately compensated.

Petitioner has alleged no deficiency or lack of adaptation on the part of the federal rule of damages in civil rights actions. Petitioner simply ignores the first mandate of 42 U.S.C. Sec. 1988 that the laws of the United States are to be utilized, and argues that federal courts must apply the state rule of damages where it is not inconsistent with federal policy. Respondent asserts that state law, so long as it is consistent with federal policy may be used, but only where the federal law is deficient or unadaptable to the action. 42 U.S.C. Sec 1988

unquestionably authorized federal courts to utilize the law (both statutory and common) of the United States in civil rights litigation. Therefore the Seventh Circuit Court of Appeals was within its statutory authority under 42 U.S.C. Sec. 1983, when it applied the federal common law rule of damages in this case.

A.2. Public Interest Not Only Demands That This Court Not Lend Credence To Petitioner's Arguments By Granting Certiorari, But Also Requires A Denial Of Certiorari To Prevent The Evisceration Of The Civil Rights Acts Contemplated If Petitioner's Arguments Are To Be Seriously Considered.

This case is not as petitioner asserts, a landmark case of national importance. It is quite simply a civil rights action brought under 42 U.S.C. Sec. 1983, to determine the damages caused by the illegal termination of respondent by the mayor of the City of Kenosha, Wisconsin, who had full knowledge his order to terminate was in violation of law. Respondent was deprived of a Due Process hearing prior to termination. Liability

was not at issue, either before the District Court for the Eastern District of Wisconsin, or the Seventh Circuit Court of Appeals. The trial, the appeal, and now the request for certiorari is involved solely with the issue of damages. Petitioner would have this Court condone a confusing patchwork of law to apply in cases arising under a federal statute and the Constitution to the United States. Petitioner would have damages, although simply a factual allegation in any complaint, subjected to a different standard than other factual allegations. Petitioner would allow some factual allegations to be brought under federal law, but damage allegations must be put to the test of state tort law. Punitive damages are decidedly to be determined under federal law. Edmonds v Dillin, (1980, ND Ohio), F. 485 Supp. 722.

If petitioner's arguments are to be given credence, not only would factual elements of a civil rights violation be subjected to different

standards, but the standards would differ from state to state. The Third Circuit Court of Appeals in Basista v Weir, 340 F. 2d 74, (1965), foresaw the problem of applying state damage rules to civil rights actions and stated at page 86:

> "We believe that the benefits of the Acts were intended to be uniform throughout the United States, that the protection to the individual to be afforded by them was not intended by Congress to differ from state to state, and that the amount of damages to be recovered by the injured individual was not to vary because of the law of the state in which the federal suit was brought. Federal common law must be applied to effect uniformity, otherwise the Civil Rights Acts would fail to effect the purpose and ends which Congress intended."

The Basista court then noted in a footnote at page 86 the wide variations among the state concerning the award of compensatory, punitive, and nominal damages. The standards of proof in most states for damages would render pursuit of civil rights violations both futile and

and meaningless. Persons' whose due process rights have been violated seldom seek medical attention, and yet 42 U.S.C. Sec. 1983 states that such violations are compensable. If they are compensable only by applying Wisconsin standards, there would be no compensation, and civil rights could be violated repeatedly with impunity and without fair and reasonable compensation.

42 U.S.C. Sec. 1988 authorizes both the use of statutory and common law remedies. 42 U.S.C. Sec. 1988, cannot be read to limit or restrict the tailoring of remedies, especially when the restriction urged upon this Court would result in rendering those damaged a hollow victory. Public interest demands that the rule of damages be one responsive to the maintenance of federal standards, Sullivan v Little Hunting Park, 396 U.S. 229, 24 L. Ed 2d 386, 90 S. Ct. 400 (1969) drawn from all authorized sources guided by the discretion of the federal judiciary.

II. THE PETITIONER REQUESTS CERTIORARI CONCERNING INSIGNIFICANT MATTERS OF NO PUBLIC CONSEQUENCE.

A.1. The Petition Should Be Denied Because The Holding Of The 7th Circuit Court Of Appeals Is Consistent With Decisions Of This Court On the Applicability Of Sec. 1988 To Sec. 1983.

Petitioner urges this Court to find inconsistency of application of Sec. 1988 to Sec. 1983 based upon two cases dealing with procedural deficiencies of the federal law. Robertson v Wegman, 436 U.S. 584 (1978) accurately determines that the Federal Rules of Civil Procedure allowing substitution of parties cannot supercede a state abatement statute. Board of Regents v Tomanio, U.S. 64 L. Ed 2d 440, 100 d. ct. (1980) decides a similar question in regard to the New York statute of limitations.

Respondent sees no inconsistency here by any stretch of the imagination. Both of the

above Courts found the federal law to be deficient in the area of Statutes of abatement and limitations, which have traditionally been found to be matters of state law. Neither of these cases are analogous to the present situation. Both cases cited by petitioner deal with known procedural deficiencies in federal law, where state statutes governing the time limits for bringing and maintaining actions have generally governed. Respondent does not see how the use of procedural state statutes in Sec. 1983 actions would justify the wholesale importation of substantive state common law to govern the awarding of damages in a federal court when the cause of action is federal.

Petitioner moves quickly to the issue of a determination on whether or not state law is inconsistent with federal policy, but he is not entitled to reach that question until a deficiency

is acknowledged in the federal law. In the present case, the Seventh Circuit Court of Appeals did not find federal law deficient on the issue of damages, and therefore was not required to make a determination on the consistency of the state law with federal policy.

A.2. The Petition Should Be Denied Because No Inconsistency Exists Between Sullivan v Little Hunting Park, 396 U.S. 229 (1969) And Later Case Law Construing Sec. 1988's Applicability To Sec. 1983.

Petitioner again raised the use of state procedural statutes in Sec. 1983 actions as an inconsistency in the applicability of Sec. 1988 to Sec. 1983. This argument has little to do with the choice of substantive law of damages. Contrary to respondent's assertions, Sullivan is entirely consistent with case law determining whether state or federal rules of damages will be employed in Sec. 1983 actions

and is entirely consistent with Sec. 1988.

Prior to Sullivan, this Court in Bell v Hood, 327 U.S. 678 90 L. Ed 939, 66 S. Ct. 773 (1945) addressed the question of choice of law of damages in federal actions where a statute did not specifically provide a remedy, and said at page 329:

> "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

The Sullivan court followed Bell and found that the existence of a statutory right implied the existence of all necessary and appropriate remedies. In addition, the Sullivan court held that damages for deprivation of a federal right are governable by federal standards as provided for by Congress in 42 U.S.C. Sec. 1988. The Sullivan court interpreted Sec. 1988 to above all

promote suitable remedies and appropriate punishment for offenses against the law. With that underlying purpose in mind, the Sullivan court found that Sec. 1988 did not restrict federal courts to use only state law, but allowed federal courts to draw from federal and state sources to establish a "federal rule responsive to the need whenever a federal right is impaired."

These decisions are wholly consistent with the later case law of this court (Carey v Piphus, 435 U.S. 247, 1978); with Sec. 1988; with federal policy; and with the purpose and spirit of the Civil Rights Acts. The holding of the Seventh Circuit Court of Appeals is consistent with case law determining that a federal rule of damages is appropriate in Sec. 1983 actions. Petitioner cannot be allowed to violate protected rights and then erect artificial barriers to prevent

recovery. Because case law supporting a federal rule of damages in Sec. 1983 actions is in complete accord with Sec. 1988, the petition for certiorari must be denied.

III. THE HOLDING OF THE SEVENTH CIRCUIT COURT OF APPEALS DOES NOT VIOLATE THIS COURTS HOLDING IN CAREY v PIPHUS, 435 U.S. 247 (1978), IN REGARD TO PROXIMATE CAUSE OR UNJUST ENRICHMENT, AND THEREFORE THE PETITION FOR CERTIORARI SHOULD BE DENIED.

A.1. Certiorari Should be Denied Because The Question On Proximate Cause Presented By Petitioner Does Not Violate This Courts Holding In Carey v Piphus, 435 U.S. 247 And Is Not Of Such Far Reaching Dimensions To Require Consideration By This Court.

Contrary to petitioner's assertions, the holdings of the District Court for the Eastern District of Wisconsin and the Seventh Circuit Court of Appeals are directly on point with this Court's holding in Carey v Piphus, 435 U.S. 247 in regard to causation. This Court in Carey, the Seventh Circuit Court of Appeals, and the trial court, in this

case, recognized that injuries cannot be presumed to flow from every deprivation of constitutional rights. All courts recognize that such injuries must be proved to have resulted from a constitutional deprivation. Proof of damage to reputation and emotional distress, according to Carey, is a subjective factual determination to be made by a trier of fact. This Court in Carey, at page 264, No. 20, determined that proof of such injuries could easily be elicited by "one's conduct observed by others."

At trial of the present case, respondent offered eleven witnesses to establish the reputational and emotional damage he suffered as a result of the petitioner's unconstitutional conduct. The trial judge heard these witnesses, evaluated their credibility, and upon the facts, determined that respondent had suffered damages as a result

of his constitutional deprivation in the moderate amount of Ten Thousand Dollars, ($10,000.00). The district court, in its Decision and Order dated August 15, 1979, (Appendix C - Petitioner's Petition), wrote a detailed Findings of Fact and Conclusions of Law wherein the court carefully set forth and traced the basis upon which its decision rested. The district judge in his Decision and Order of February 12, 1980, (Appendix D - Petitioner's Petition) also made quite clear that not all of respondent's injuries were caused by the conduct of petitioner, and that the damages assessed were only those which the district court found attributable to petitioner's illegal conduct. Upon review, the Seventh Circuit found the evidence sufficient to sustain the district court's award of $10,000.00 for the emotional distress and

damaged reputation respondent suffered as a result of the deprivation of his due process rights. Busche v Burkee, slip op, at 15, (May 21, 1981).

The record clearly does not violate this Court's holding in Carey v Piphus, 435 U.S. 247. The district court did not presume damages to flow from a constitutional deprivation. The district court found plaintiff did suffer emotional and reputation damage subsequent to his discharge, 474 F. Supp. at 493, based upon the testimony of eleven witnesses. The district court did take into account that some of respondent's difficulties arose from his subsequent reinstatement and suspension, and assessed damages only for those injuries related to the unlawful discharge. The district court capably determined the factual issue of causation

and was supported in its decision by the Seventh Circuit Court of Appeals. The Seventh Circuit met all of Carey's causation requirements and rightfully placed the determination of causation in the hands of the trial court to be based upon the evidence presented.

Absent the alleged inconsistency of this decision with this Court's decision in Carey, respondent asserts that a question of proximate cause is hardly an issue that this Court should consider to be of such paramount importance to grant certiorari. Absent any showing of a clearly erroneous or unsubstantiated decision on a question as ordinary as a determination of cause in relation to damages, there is no basis for certiorari to be granted.

A.2. The Petition For Certiorari Should Be Denied Because Respondent's Subsequent Reinstatement And Suspension Did Not Justify His Illegal Discharge Nor Would He Be Unjustly Enriched By

Compensation For Injuries Sustained As A Result Of The Illegal Discharge.

Defendant stretches this Court's decision in Carey v Piphus to read that if any disciplinary action is justified, respondent can be deprived of compensatory damages. The Carey decision quite simply does not stand for such a principle. This Court in Carey states that if, on rehearing, the initial act was justified, then no compensation could be awarded for the initial failure to provide due process. 435 U.S. at 263. Respondent was illegally discharged without a Due Process hearing by petitioner for signing certain forms in blank. At a Due Process hearing held thirty (30) days after his discharge, the Police and Fire Commission found that respondent's discharge was not a justifiable punishment for his "wrongdoing". The Police and Fire Commission reinstated the respondent and subsequently punished his "wrongdoing" by a sixty day suspension.

The very act of reinstatement and supension indicates that plaintiff's illegal discharge by defendant was not justified. Because the illegal discharge was not found to have been justified by the Police and Fire Commission, under the principles of Carey, plaintiff is not barred from compensation for his deprivation of procedural due process. The initial discharge was not justified; respondent suffered injuries as a result of this illegal discharge; and respondent is therefore entitled to recover damages for those injuries. Respondent is therefore not unjustly enriched by the modest award of Ten Thousand Dollars for a deprivation of his constitutional rights.

IV. THE REQUEST FOR A MANDATORY DUE PROCESS HEARING ON THE AMOUNT OF ATTORNEY'S FEES SHOULD NOT BE CONSIDERED AT ALL IN THIS REQUEST FOR CERTIORARI BECAUSE THE ISSUE IS NOT RIPE FOR CONSIDERATION.

On February 12, 1980, in its Decision and Order, the district court denied defendant's

motion for rehearing on the amount of attorney's fees and for a breakdown of damages. (Appendix D - Petitioner's Petition). The Seventh Circuit Court of Appeals, in its decision of May 21, 1981, Busche v Burkee, slip op, at 21 (1981), remanded the issue of attorneys fees to the district court for reconsideration under the standard of Muscare v Quinn, 614 F 2d 577 (7th Cir. 1980). On July 23, 1981, the defendant moved the district court for a full adversary hearing on attorneys fees. To date the district court has not denied said request, nor has respondent objected to the requested hearing on attorneys fees. Without a denial of the requested hearing by the district court, the petitioner's request for a determination by this Court is untimely. This issue is not ripe for consideration by this Court and should therefore not be considered by this Court.

CONCLUSION

Respondent respectfully submits, for the reasons outlined above, that this Court deny the petition for Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

Respondent additionally requests that should the petition for a Writ of Certiorari be denied, that this Court assess attorney's fees and costs for the instant proceeding against the petitioner.

Respectfully submitted,

WALTER W. STERN, Attorney
for Respondent

Dated:

9-2-81